

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1932

No. 5655

185

**MARIE J. J. FLEITMANN & THOMAS CRIMMINS,
EXECUTORS OF THE ESTATE OF HERMAN C.
FLEITMANN, APPELLANTS,**

vs.

**DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.**

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED APRIL 13, 1932.

PRINTED JUNE 13, 1932.

Court of Appeals of the District of Columbia

APRIL TERM, 1932.

No. 5655

MARIE J. J. FLEITMANN & THOMAS CRIMMINS,
EXECUTORS OF THE ESTATE OF HERMAN C.
FLEITMANN, APPELLANTS,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

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Court of Appeals of the District of Columbia

No. 5655.

MARIE J. J. FLEITMANN & THOMAS CRIMMINS, Executors of
the Estate of Herman C. Fleitmann, Appellants,

vs.

DAVID BURNET, Commissioner of Internal Revenue.

1

Docket No. 17121.

HERMAN C. FLEITMANN, Amended by Order of 3-2-31 to
Read Marie J. J. Fleitmann, and T. Crimmins, Executors
of the Estate of Herman C. Fleitmann,

vs.

COMMISSIONER OF INT. REV.

For Taxpayer: Richard E. Dwight, Esq., W. N. Wood,
Esq., Fred S. Winston, Esq., Harry Friedman (With-
drawn), Howe P. Cochran, Esq.

For Commissioner: Bruce A. Low, Esq., E. Meacham,
Esq.

Docket Entries.

1926.

June 11. Petition received and filed.

“ 15. Copy of petition served on Solicitor.

“ 15. Notification of receipt mailed taxpayer.

“ 19. Motion for 120 days extension to file answer
filed by Solicitor.

July 2. Granted. Both sides notified.

Dec. 8. Answer filed by G. C.

1927.

Jan. 3. Copy of answer served on taxpayer—General
Calendar.

1928.

July 6. Hearing set Nov. 8, 1928.

Oct. 12. Motion for transfer to Reserve Cal. filed by G. C.

“ 15. Motion for transfer to Reserve Cal. granted.

1929.

Nov. 12. Hearing set Jan. 13, 1930.

Dec. 19. Motion for leave to file amended petition filed by taxpayer. Amended petition tendered. 12-20-29 granted.

“ 20. Motion to limit hearing filed by taxpayer. 12-31-29 granted.

“ 27. Copy of motion and amendment served on G. C. 1930.

Jan. 7. Notice of appearance of W. N. Wood filed.

“ 9. Motion to place on reserve calendar filed by G. C. 1-10-30 Granted.

“ 15. Answer to amended petition filed by G. C. 1-16-30 copy served.

July 16. Motion to place on day calendar filed by taxpayer. 7-17-30 granted to 10-2-30.

Sept. 24. Motion for continuance to Oct. 8, 1930 filed by taxpayer. 9-26-30 Granted.

“ 24. Notice of the appearance of Harry Friedman counsel for taxpayer filed.

“ 24. Motion for leave to file amended answer to amended petition filed by G. C. Amended answer tendered.

“ 26. Motion to file amended answer granted.

Oct. 3. Application for subpoena of H. C. Fleitmann filed by G. C. 10-31-30 Subpoena issued.

“ 8. Hearing had before Mr. Arundell, Div. 7. Continued to 10-27-30. Application for subpoena (R. Kemp Slaughter) filed at hearing.

“ 8. Order of continuance to Oct. 27, 1930 on merits entered.

“ 24. Deposition of John S. Shea filed. (2)

“ 24. Deposition of Chas. W. Anderson filed. (2)

2

1930.

Oct. 23. Application for subpoena of Wm. J. O'Brien and John S. Shea filed by taxpayer.

1930.

- Oct. 23. Subpœna issued—O'Brien and John S. Shea.
“ 27. Hearing had before Mr. Arundell, Div. 7, called on merits. Consolidated with 28450. Briefs due Dec. 22, 1930. Reply briefs due Jan. 22, 1931.
Nov. 3. Transcript of hearing Oct. 27, 28, 1930 filed.
Dec. 19. Motion to extend time to Jan. 5, 1931 to file brief and that time for reply brief be extended 30 days from date, filed by G. C. and granted.

1931.

- Jan. 3. Brief filed by G. C. Served 1-5-31.
“ 5. Memorandum filed by taxpayer. Served.
“ 28. Reply brief filed by G. C.
“ 30. Notice of withdrawal of Harry Friedman as counsel for taxpayer filed. Appearance of Howe P. Cochran filed.
“ 30. Motion for extension of two weeks to file reply brief filed by taxpayer. 1-31-31 Granted.
Feb. 18. Reply brief filed by taxpayer.
Mar. 2. Order to substitute Marie J. J. Fleitmann and Thomas Crimmins, as Executors of Estate of Herman C. Fleitmann.
Apr. 20. Findings of fact and opinion rendered, C. Rogers Arundell, Div. 7. Proceeding restored to general calendar for hearing on merits.
“ 25. Hearing set May 28, 1931.
May 28. Hearing had before Mr. Murdock, Div. 3. Stipulation of deficiency filed.
June 3. Decision entered, Div. 3.
Nov. 27. Stipulation for review to Ct. of Ap. of D. C. filed.
“ 27. Petition for review by Ct. of Ap. of D. C. with assignments of error filed by taxpayer.
“ 27. Proof of service filed.
Dec. 29. Statement of evidence lodged.
“ 29. Notice of lodgment of statement and of hearing Jan. 13, 1932 filed.

1932.

Jan. 12. Objections to statement of evidence filed by G. C.

“ 13. Hearing had before Mr. Arundell, Div. 7, on approval of statement of evidence and continued to Feb. 17, 1932.

“ 13. Order of continuance to Feb. 17, 1932 on approval of statement of evidence.

“ 18. Motion for extension of 60 days to prepare and transmit record filed by taxpayer.

“ 19. Order enlarging time to March 26, 1932 for preparation of evidence and transmission and delivery of record entered.

Feb. 10. Motion for continuance to 3-1-32 on statement of evidence filed by G. C.

“ 12. Order of continuance to March 2, 1932 on approval of statement of evidence entered.

Mar. 2. Hearing had before Mr. Arundell, Div. 7, on approval of statement of evidence. Parties to submit agreed statement.

“ 16. Motion for extension to 4-15-32 to prepare and transmit record filed by taxpayer.

3

“ 17. Order enlarging time to April 15, 1932 for preparation of evidence and delivery of record entered.

“ 23. Agreed statement of evidence lodged.

“ 25. Agreed statement of evidence approved and ordered filed.

“ 29. Agreed præcipe filed—proof of service thereon.

4 Filed 12/20/29.

United States Board of Tax Appeals.

Docket No. 17121.

HERMAN C. FLEITMANN, 356 Fourth Ave., New York, N. Y.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amended Petition.

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commis-

sioner of Internal Revenue in his notice of deficiency (IT:PA:PYA-60J-ARM) dated April 20, 1926, and as a basis of his proceedings alleges as follows:

1. The petitioner is an individual with his office at 356 Fourth Avenue, New York, N. Y.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on April 20, 1926.

3. The taxes in controversy are Income and Surtaxes for the calendar year 1918 and for \$70,608.70.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. failure of the Commissioner to assess or collect the proposed deficiency within five years after the filing of the petitioner's return for the year 1918.

b. inclusion in the taxpayer's taxable income of 60% of the undistributed profits of Seaboard Mills, Inc., \$46,670.10.

c. inclusion in the taxpayer's taxable income of 60% of the dividends received by Seaboard Mills, Inc., \$4,680.00.

d. inclusion in the taxpayer's taxable income of $41\frac{2}{3}\%$ of the income of Fleitmann & Co., Inc. for the period January 1, 1918 to May 23, 1918, \$51,888.36.

e. inclusion in the taxpayer's taxable income of $41\frac{2}{3}\%$ of the dividends received by Fleitmann & Co., Inc. in respect of the period January 1, 1918 to May 23, 1918 \$14,829.37.

5 f. failure to treat dividends received by the petitioner from Fleitmann & Co., Inc., as representing in part a return of capital.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

a. The taxpayer filed his income tax return for the year 1918, on March 14, 1919. The deficiency letter is dated April 20, 1926, a date more than five years after the filing of the return for the year 1918. The deficiency shown in the said deficiency letter was not assessed within five years after the filing of petitioner's return for the year 1918.

b. The Department to date has refused Seaboard Mills, Inc. classification as a personal service corporation under the provisions of Section 200 of the Revenue Act of 1918, and the status of the Seaboard Mills, Inc., is under appeal to the United States Board of Tax Appeals (see paragraph

2 of statement attached to the Commissioner's deficiency letter of April 20, 1926).

c. By virtue of the decision of the Supreme Court of the United States in the case of Eisner v. Macomber, 252 U. S. 189, undistributed earnings of a personal service corporation are not taxable to the stockholder as part of his income.

d. Fleitmann & Co., Inc. was incorporated May 24, 1918 and took over the business of the partnership as of January 1, 1918 pursuant to the terms of an agreement dated April 30, 1918 and originally filed its tax return for the calendar year 1918.

e. Fleitmann & Co., Inc. declared dividends out of the profits of the year 1918, including the profits earned between January 1st and May 23, 1918, on the assumption that the entire profits of the year 1918 represented earned surplus and the stockholders reported such dividends as taxable income and paid taxes thereon.

f. A field examination disclosed that Fleitmann & Co., Inc. was prevented from filing a return for the whole year by Section 330 of the Revenue Act of 1918 because its net income was less than 20% of its invested capital.

g. Fleitmann & Co., Inc. on or about October 27, 1923 filed an amended return pursuant to the field examination at the same time exercising its right to consolidate with the Fairmont Manufacturing Company by virtue of its ownership and control of over 97% of the outstanding voting stock of that company and as no new books had been opened for the corporation the balances as of May 31, 1918 were adjusted to the date of incorporation May 24, 1918 for the purpose of the amended return.

6 h. The corporation in its amended return treated the dividends in excess of corporation earnings as paid out of "Surplus or Capital paid in" at the time of actual incorporation; namely, May 24, 1918, and in computing invested capital charged such dividends against the paid-in surplus as in excess of available earnings.

i. The Field Examiner rendered a partnership report for the period January 1, 1918 to May 23, 1918 (which is upheld by the Commissioner in his deficiency letter of April 20, 1926 in paragraph 4 of the Statement attached thereto) and reported as taxable income accruing to the Petitioner $41\frac{2}{3}\%$ of the profits of the so-called "partnership" and

41 $\frac{2}{3}$ % of the dividends received by the so-called "partnership".

j. The partnership of Fleitmann & Company terminated its existence at December 31, 1917, pursuant to the terms of an agreement dated April 30, 1918, and the taxpayer's interest in the corporation, instead of being 41 $\frac{2}{3}$ % was 48.43% and increased to 50.17% during the year 1918.

k. The petitioner did not receive any part of this so-called partnership income, either by way of stock, property or cash except insofar as dividends paid by the corporation may be regarded as being paid out of such profits and the income attributed by the field agent to the period January 1, 1918 to May 23, 1918 is based upon what he believes the Petitioner would have been entitled to if the partnership had not transferred its business to the corporation as at the close of its last fiscal year, viz. December 31, 1917.

l. The taxable income of Fleitmann & Co., Inc. for the period from May 24th to December 31, 1918, 1919 and 1920 was tentatively stated in the 30 day letter of the Commissioner of Internal Revenue dated February 19, 1924, Symbols IT:CA:T 2212-6-App. A protest against such determination was duly filed on or about March 5, 1924 and a hearing held before the Tax Unit on June 4, 1924, but no decision has been rendered thereon and the taxable status of the dividends received from Fleitmann & Co., Inc. by the stockholders cannot be finally determined until a final determination has been had upon such protest and the return of the corporation finally determined and settled.

6. Wherefore the petitioner prays that this Board may hear the proceeding and decide:

A. That the proposed deficiency for the year 1918 was not assessed within five years after the return for 1918 was filed and that the proposed deficiency for the year 1918 is barred from assessment and collection.

B. No part of the undistributed earnings of the Seaboard Mills, Inc. should be taxed to the Petitioner.

7 C. No part of the profits of Fleitmann & Co., Inc. for the period January 1, 1918 to May 23, 1918 should be taxed to the Petitioner as partnership income.

D. Dividends received from Fleitmann & Co., Inc. in excess of earnings available for dividends and/or paid from the income attributed to the period January 1, to May 23,

1918 should be excluded from the Petitioner's income as a return of capital.

(Signed)

RICHARD E. WRIGHT,
Counsel for Petitioner,
100 Broadway, New York City, N. Y.

STATE OF NEW YORK,

County of New York, ss:

Herman C. Fleitmann, being duly sworn, says that he is the petitioner above named; that he has read the foregoing amended petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

(Signed)

HERMAN C. FLEITMANN.

Subscribed and sworn to before me this 16th day of December, 1929.

(Signed)

HARRY LANGFORD, [SEAL.]
Notary Public.

(Stamped:) Harry Langford, Notary Public, Nassau County. Certificate filed in New York Co. Co. Clerk's No. 611, Reg. No. 11,413. Commission expires March 30, 1931.

8

EXHIBIT A.

Copy.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to IT: PA: PYA-60J. ARM.

April 20, 1926.

Mr. Herman C. Fleitmann,
356 Fourth Avenue,
New York, New York.

SIR:

In accordance with the provisions of Section 279 (a) of the Revenue Act of 1926, there has been assessed against

you an income and profits tax amounting to \$70,608.70 for the taxable year 1918 the details of which are set forth in the attached statement.

In accordance with the provisions of Section 274 (a) of the same Act, you are allowed sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter within which to file a petition with the United States Board of Tax Appeals, contesting in whole or in part the correctness of this determination.

Respectfully,

D. H. BLAIR,
Commissioner,

(S.)

By C. R. NASH,
Assistant to the Commissioner.

Enclosure: Statement.

9

Copy.

Statement.

IT: PA: PYA-60J. ARM.

In re Mr. Herman C. Fleitmann, 356 Fourth Avenue, New York, New York.

1918 Deficiency in Tax, \$70,608.70 (Waiver Executed).

Reference is made to the Revenue Agent's report dated January 7, 1924, covering an investigation of your income tax return for the year 1918. A reaudit of your return in connection with the Revenue Agent's report indicates an additional tax liability of \$70,608.70.

Information has been received that the Seaboard Mills, Incorporated, has appealed to the United States Board of Tax Appeals relative to the denial of personal service classification. Since your return was audited on the above basis it appears that you have been allowed an overassessment on a basis which you as a stockholder of the corporation are now protesting.

It is held that the previous allowance is erroneous and your return has been reaudited to include the amounts previously eliminated. The income originally reported by you

from this corporation has accordingly been accepted and included in your taxable net income.

No change has been made in income which you received from Fleitmann and Company as reported in the Revenue Agent's report. It is held that the partnership was in existence up to May 23, 1918, and the corporation was not organized until May 24, 1918. Your net income as determined in the Revenue Agent's report is \$196,253.89 on which the correct tax liability is \$85,014.40 and the additional tax \$70,608.70.

Since the statutory period for making assessments for the year 1918 was about to expire, it was necessary to make immediate assessment under the provisions of Section 279 of the Revenue Act of 1926. It will, therefore, be impossible to grant you the usual thirty-day period in which to file a protest to this office prior to consideration of the case by the United States Board of Tax Appeals.

10

Filed Sept. 26, 1930.

United States Board of Tax Appeals.

Docket No. 17121.

HERMAN C. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amended Answer to Amended Petition.

The respondent, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for amended answer to amended petition, in lieu and in substitution of the answer filed January 15, 1930, to petitioner's amended petition filed December 19, 1929, admits and denies as follows:

1. Admits the statements and allegations contained in introductory paragraph and paragraph No. 1 of the amended petition heretofore referred to.

2. Admits the allegations contained in paragraph No. 2 of the amended petition heretofore referred to.

3. Admits the allegations contained in paragraph 3 of the amended petition heretofore referred to.

4. Denies that the respondent erred in determining or computing petitioner's tax liability for the calendar year 1918, as alleged in corresponding paragraph of the amended petition heretofore referred to.

5. The respondent admits, denies and avers with reference to the allegations contained in paragraph No. 5 of the amended petition heretofore referred to as follows:

11 (a) Admits that the deficiency letter was dated and mailed April 20, 1926, but denies all of the remaining allegations contained in corresponding subparagraph of the amended petition heretofore referred to.

(b) to (l), inclusive. Denies all allegations contained in corresponding subparagraphs of the amended petition heretofore referred to.

(m) The respondent avers that the petitioner filed his income tax return for the year 1918 on March 15, 1919, and that the deficiency letter was mailed to the petitioner on April 20, 1926, and the respondent further avers that the petitioner and the respondent in writing entered into five valid and subsisting waivers for 1918, which were accepted by the respondent and which extended the period for making assessment and collection of petitioner's income tax for 1918 to a period beyond April 20, 1926, as more particularly shown by photostatic copies of such waivers, which are hereto attached and made a part hereof and are numbered in their chronological order as Exhibits 1 to 5, respectively.

6. Denies generally and specifically each and every allegation not hereinbefore admitted or qualified.

Wherefore it is prayed that the relief sought by the petitioner be denied.

(Signed)

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

BRUCE A. LOW,
Special Attorney.

12 NOTE.—Exhibits 1 to 5, inclusive, omitted from Amended Answer to Amended Petition. Same as Respondent's Exhibits FF, GG, HH, in Docket 28450, Petitioner's Exhibit 4 in Docket 28451 and Respondent's Exhibit II in Docket 28450, respectively.

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors of the Estate of Herman C. Fleitmann, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated April 20, 1931.

Waivers executed by the decedent, to which the Commissioner's name was affixed by employees at the direction of persons authorized by the Commissioner to sign his name, are valid and extend the statutory period.

Richard E. Dwight, Esq., F. S. Winston, Esq., W. N. Wood, Esq., and Howe P. Cochran, Esq., for the petitioners.
Bruce A. Low, Esq., for the respondent.

The respondent made a jeopardy assessment of a deficiency in income tax in the amount of \$70,608.70 for the calendar year 1918. Upon motion of counsel for petitioners the hearing in the first instance was limited to the question of whether collection is barred by the statute of limitations.

Findings of Fact.

Herman C. Fleitmann filed his income-tax return for the calendar year 1918 on March 15, 1919.

On February 9, 1924, Fleitmann executed a waiver extending for a period of one year from that date the period for assessment and collection of 1918 taxes. Commissioner Blair's name was signed to this waiver on February 13, 1924, by Albert Lewis, who was then head of the Personal Audit Division of the Income Tax Unit and who had been authorized by Blair to sign his name to waivers.

On February 21, 1924, Fleitmann executed a waiver extending the time for assessment and collection for one year after the expiration of the statutory period of limitation or such period as extended by any waivers already on file. Commissioner Blair's name was affixed to this waiver on February 8, 1926.

On December 20, 1924, respondent wrote to Fleitmann requesting a further waiver for 1918. In response to this request Fleitmann on December 24, 1924, executed a waiver extending the time for assessment and collection for one year after the expiration of the statutory period or such period as extended by any waivers already on file. Commissioner Blair's name was affixed to this waiver on February 8, 1926, by Albert Lewis.

14 On February 10, 1925, a jeopardy assessment of income tax for the year 1918 in the amount of \$70,608.70 was made against Fleitmann and he was notified thereof by letter dated February 6, 1925. His counsel protested to the Commissioner, stating among other things that "waivers were duly filed with the Department in December, 1924 * * *". On March 3, 1925, Commissioner Blair wrote to the Collector at New York, referring to the assessment made and stating in part that "Waivers have now been received * * *" and that a certificate of over-assessment would be prepared. Subsequently a certificate of overassessment was prepared and the entire assessment of \$70,608.70 was abated. In the certificate sent to Fleitmann it was stated that "Since you have filed a waiver for the year 1918 the tax of \$70,608.70 has been overassessed."

On March 3, 1926, a jeopardy assessment of \$70,608.70, income and profits taxes for 1918, was entered against Fleitmann and he was notified thereof by letter dated April 20, 1926. The petition for redetermination is based upon that notice.

On November 5, 1926, respondent wrote to Fleitmann requesting waivers for the years 1918 to 1921, inclusive. Fleitmann, on November 8, 1926, executed a waiver for the years 1918 to 1921 extending the time to December 31, 1927, except that if a notice of deficiency was sent before that date then the time was to be extended by the time provided by statute. Commissioner Blair's name was affixed to this waiver by the secretary to H. B. Robinson at his direction. Robinson was head of a division in the Income Tax Unit and held a written authorization to sign the Commissioner's name to waivers.

On September 27, 1929, Fleitmann executed a waiver extending until December 31, 1930, the time for collection of the assessment of \$70,608.70 made in 1926, above referred

to. This waiver bears the name of Commissioner Lucas in typewriting followed by that of Collector Anderson written with ink. Anderson's name was signed at his direction by a deputy collector.

Opinion.

ARUNDELL:

The argument of petitioners that collection is barred is based on their contention that the assessment is invalid because the limitation period had run when the assessment was made on March 13, 1926.

The question of the validity of the waivers filed by reason of their being signed for the respondent by persons other than the respondent himself is disposed of by our opinion in Frederick T. Fleitmann, decided this day. The return in this case having been filed on March 15, 1919, the statute of limitations, unless waived, would have barred
15 assessment after March 15, 1924. The following waivers were executed and filed:

Kind	Date of waiver	Extension
Assessment and Collection.....	Feb. 9, 1924	To Feb. 9, 1925.
Do	Feb. 21, 1924	To Feb. 9, 1926.
Do	Dec. 24, 1924	To Feb. 9, 1927.
Assessment	Nov. 8, 1926	To Dec. 31, 1927.
Collection	Sept. 27, 1929	To Dec. 31, 1930.

Petitioners concede that the waiver of February 9, 1924, was a good waiver and extended the time to February 9, 1925. There is some contention as to the period of extension under the next waiver—that of February 21, 1924, petitioners claiming it was intended to run concurrently with that of February 9, and respondent contending that it extended the period to February 9, 1926. We think the respondent's view is correct. The second waiver specifically provides that:

This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau * * *.

As set out in the findings of fact, the Commissioner's name had been signed to the first waiver on February 13,

1924, and it was on file in the Bureau when the second was executed by Fleitmann. Accordingly, upon its face, the effect of the second waiver operated to extend the period for assessment and collection to February 9, 1926. It was put in evidence by the respondent in support of his claim that the assessment was timely. Petitioners introduced no evidence whatever to show that the parties in executing the waiver intended anything other than expressed intent of the plain words of the waiver. It was signed by the respondent on February 8, 1926, which was before the expiration date.

The next waiver in the series, dated December 24, 1924, provides that it "will remain in effect for a period of one year after the expiration of * * * the statutory period of limitation as extended by section 277(b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau." This extended the period to February 9, 1927, and before that date the assessment was made and notice of deficiency was sent. Consequently, the assessment was timely and collection is not barred. The waivers subsequently given require no discussion.

The proceeding will be restored to the general calendar for hearing on the merits in due course.

16 Filed at Hearing May 28, 1931.

United States Board of Tax Appeals.

Docket No. 17121.

MARIE J. J. FLEITMANN et al., Executors of the Estate of
Herman C. Fleitmann, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation of Deficiency.

It is hereby stipulated and agreed by and between the parties to this proceeding, by and through their respective attorneys of record, that the liability of the petitioners for Federal income taxes for the taxable year 1918 is as hereinafter set forth and that the Board may enter an order of final determination in accordance herewith.

Correct tax liability.....	\$51,341.78
Taxes paid.....	14,405.70

Unpaid portion of tax liability.....	\$36,936.08
--------------------------------------	-------------

Taxes previously assessed (net)	\$85,014.40
Correct tax liability.....	51,341.78

Portion of unpaid assessment to be abated \$33,672.62

This stipulation is entered into without prejudice to the right of the petitioners to petition the Circuit Court of Appeals for a review of the Board's decision in respect of the issue pertaining to the statute of limitations.

(Signed) H. P. COCHRAN,
Attorney for Petitioner.

(Signed) C. M. CHAREST,
*General Counsel, Bureau of Internal
Revenue, Attorney for Respondent.*

17 United States Board of Tax Appeals, Washington.
Docket No. 17121.

MARIE J. J. FLEITMANN et al., Executors of the Estate of
Herman C. Fleitmann, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Board on May 28, 1931, it is

Ordered and decided that the liability of the petitioners for Federal income taxes for the year 1918 is as follows:

Correct tax liability.....	\$51,341.78
Taxes paid.....	14,405.70

Unpaid portion of tax liability.....	\$36,936.08
--------------------------------------	-------------

Taxes previously assessed (net)	\$85,014.40
Correct tax liability.....	51,341.78

Portion of unpaid assessment to be abated \$33,672.62

Entered June 3, 1931.

[Seal U. S. Board of Tax Appeals.]

(Signed)

J. S. MURDOCK,
Member.

(Stamped:) Certified copy sent to each party.

18 United States Board of Tax Appeals.

United States Board of Tax Appeals.

(Docket No. 17121.)

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Peti-
tioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

United States Board of Tax Appeals.

(Docket No. 28450.)

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

United States Board of Tax Appeals.

(Docket No. 28451.)

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Peti-
tioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

*Stipulation for Review by Court of Appeals of District of
Columbia.*

Whereas Frederick T. Fleitmann, petitioner in Docket
#28450, is a resident and inhabitant of Switzerland and is
not an inhabitant of any circuit of the United States Circuit
Court of Appeals, and

Whereas all three of the above-entitled actions involve questions of similar character,

Therefore it is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the decisions of the Board of Tax Appeals in the three cases above named may be reviewed by the Court of Appeals of the District of Columbia.

(Signed)

HOWE P. COCHRAN,
Attorney for Petitioner.

(Signed)

C. M. CHAREST.

Dated this 7th day of November, 1931.

20 United States Board of Tax Appeals. Filed Nov.
27, 1931.

Court of Appeals of the District of Columbia.

United States Board of Tax Appeals.

(Docket No. 17121.)

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

*Petition for Review of Decision of the United States Board
of Tax Appeals to the Court of Appeals of the District
of Columbia.*

To the Honorable Judges of the Court of Appeals of the
District of Columbia:

Your petitioners, Marie J. J. Fleitmann and Thomas Crimmins, Executors of the Estate of Herman C. Fleitmann, Deceased, by their attorney, Richard E. Dwight, respectfully show:

I. This is a proceeding for review by the Court of Appeals of the District of Columbia of a decision by the United States Board of Tax Appeals entered on the 3rd day of June, 1931, pursuant to the Board's findings of fact and opinion promulgated on the 20th day of April, 1931,

redetermining against your petitioners, as Executors of the Estate of Herman C. Fleitmann, deceased, a deficiency in income and profits taxes for the year 1918 in the aggregate amount of \$36,936.08.

21 II. Herman C. Fleitmann died on —, —, —.

Letters testamentary were issued by the Surrogate Court for the County of New York, State of New York, to your petitioners, the executors named in the last will and testament of said Herman C. Fleitmann. Your petitioners are still serving in the capacity of Executors of the Estate of Herman C. Fleitmann and have not been discharged.

III. This appeal to the Court of Appeals of the District of Columbia is taken pursuant to a stipulation entered into between the parties hereto in accordance with the terms of Paragraph (d) of Section 1002 of the Revenue Act of 1926.

IV. Herman C. Fleitmann duly filed his income and profits tax return for the year 1918 in the office of the Collector of Internal Revenue for the Third Collection District of the State of New York on March 15, 1919. Pursuant to said return taxes were assessed against and paid by said Herman C. Fleitmann. After such payments the respondent assessed and proposed to collect from said Herman C. Fleitmann additional taxes for the year 1918, whereupon said Herman C. Fleitmann appealed to the United States Board of Tax Appeals and prayer for a redetermination and cancellation of his liability for further taxes for the year 1918. At the hearing on this appeal your petitioners were substituted for said Herman C. Fleitmann,
22 deceased.

V. The point at issue before the United States Board of Tax Appeals on this appeal was whether or not the statute of limitations had run against the assessment and/or collection of these taxes. That issue depended in turn on the validity or invalidity of certain waivers. In this case three waivers were executed by the taxpayer prior to the date of the assessment of the tax. The first waiver was signed by the taxpayer on February 9, 1924 and extended the statute of limitations for one year from its date or to February 9, 1925. The second waiver was dated February 21, 1924, and purported to extend the statute of limitations for one year beyond the date to which the statute had al-

ready been extended by waivers. But this waiver was not signed by the Commissioner until February 8, 1926. In the meantime on December 24, 1924 a third waiver was signed by the taxpayer. This waiver extended the statute of limitations for one year after the expiration of the statute of limitations or such period as extended by any waivers already on file. However at the date of the execution of this waiver there was on file only one waiver that had been signed by the Commissioner, viz., the first waiver of February 9, 1924. It is true that there was in the file at the time an additional incomplete and unexecuted waiver form but it is the contention of your petitioners that as it lay in the file it was totally without effect in extending the period of limitations. Accordingly, if that view is accepted, the third waiver extended the period of limitations for one year beyond the expiration of the first waiver or to February 9, 1926. The assessment was made on March

13, 1926 and the Board of Tax Appeals held such assessment to be on time, and that the statute of limitations had not yet run against the collection of said tax. It is from that holding that your petitioners appeal to this Court.

Two later waivers were furnished by Herman C. Fleitmann, one on November 8, 1926 and one on September 27, 1929. Your petitioners contend that the 1926 Revenue Act intervened to extinguish the liability prior to the giving of these waivers and accordingly they are entirely without effect. If consideration of them should be required, a question arises similar in character to the issue raised by the appeal of Frederick T. Fleitmann, Docket No. 28450. The name of the Commissioner was signed to the waiver of November 8, 1926 by a stenographer in the office of the Bureau of Internal Revenue, who worked in the office of one, H. B. Robinson, who held written authority to sign the Commissioner's name. On the waiver of September 27, 1929 the name of the Commissioner was stamped by an unidentified individual by the name of O'Brien who apparently was connected with the office of the Collector of Internal Revenue for the Third Collection District of the State of New York. It was not shown that either of these parties held authority from the Commissioner of Internal Revenue to sign his name to waivers.

VI. On April 20, 1931, the United States Board of Tax Appeals filed its findings of fact and opinion declaring that all the waivers in the case were valid and effective waivers from their date of filing, and holding that neither the assessment nor collection of the taxes in question was barred by the statute of limitations, and on June 3, 1931 the said

Board entered a formal order stating that there was
24 a deficiency for 1918 in the amount of \$36,936.08.

VII. The errors committed by the United States Board of Tax Appeals upon which your petitioners rely as the basis of this proceeding are as follows:

1. On the evidence the Board erred in entering judgment for the Commissioner.

2. On the evidence the Board erred in approving and re-determining the deficiency found by the Commissioner.

3. On the evidence the Board erred in failing to hold that the assessment against Herman C. Fleitmann was barred by the statute of limitations at the time it was made.

4. On the evidence the Board erred in failing to hold that the collection of the tax assessed against Herman C. Fleitmann was barred by the statute of limitations at the time of the decision by the Board.

5. The Board erred in failing to hold that on the evidence the burden of proof was on the respondent in this case to prove that the period of limitations had been extended by valid waivers.

6. On the evidence the Board erred in failing to hold that the waiver signed by the taxpayer on February 21, 1924, was without effect in extending the statute of limitations prior to the date the signature of the Commissioner of Internal Revenue was placed thereon.

7. On the evidence the waiver of February 21, 1924 was not signed by the Commissioner until February 8, 1926. It is the contention of your petitioners that this instrument
25 was not an effective waiver during the time that it lay in the office of the Bureau of Internal Revenue unsigned by the Commissioner. Accordingly when the waiver of December 24, 1924, was filed extending the period of limitations for one year after the expiration of the statutory period or such period as extended by any waivers already on file, there was only one waiver on file extending the statutory period, and that was the waiver of

February 9, 1924. Accordingly the waiver of December 24, 1924 only extended the statute for one year from February 9, 1925 or until February 9, 1926, and the Board erred when they held that said waiver of December 24, 1924 extended the statute of limitations to February 9, 1927.

8. On the evidence the Board erred in failing to hold that all liability for 1918 taxes on the part of Herman C. Fleitmann was extinguished by the passage of the Revenue Act of 1926 on February 26, 1926.

9. On the evidence the Board erred in failing to hold that said liability once extinguished was never revived.

10. On the evidence the Board erred in holding that the waivers executed by Herman C. Fleitmann on November 8, 1926 and September 27, 1929 effected in any way the statutory period for collection of 1918 taxes from Herman C. Fleitmann or his estate.

11. The Board erred in failing to hold that the waivers of November 8, 1926 and September 27, 1929 were invalid and void for the reason that there is nothing in the evidence to show that either of them was signed for the Commissioner prior to the date on which they expired on their face.

26 12. On the evidence the Board erred in failing to hold that the waivers of November 8, 1926 and September 27, 1929 were invalid and void for the reason that they were never signed by the Commissioner or anyone authorized to sign in his stead.

13. The Board erred in holding that "when the correspondence between the parties shows that they understood the statute to be extended there is a sufficient consent in writing."

14. The Board erred in holding that the consents in writing were complete when the petitioner signed and filed the waiver forms.

15. The Board erred in holding that the signing of a waiver comprised two elements: first, the discretionary duty of approval which could not be delegated by an agent, and second, the ministerial duty of signing the name of the Commissioner which could be delegated by an agent.

16. The Board erred in holding that the signing of the Commissioner's name to a waiver was a ministerial act.

17. The Board erred in holding that the duty of signing

the Commissioner's name to a waiver could be delegated by an agent.

18. The Board erred in holding that under their authorization Robinson and Anderson could redelegate to subordinates the duty of signing the Commissioner's name to waivers.

19. The Board erred in holding that the attempted re-delegation to subordinates by Robinson and Anderson of the duty of signing the Commissioner's name to these waivers was a valid redelegation.

20. The Board erred in holding that the evidence showed that there was no attempt on the part of Robinson
27 and Anderson to redelegate the duty of passing upon the acceptability of waivers.

21. The Board erred in holding that the evidence showed that said duty "was personally performed by Robinson and Anderson by having the waivers presented to them for decision as to their acceptability."

22. The Board erred in holding that the evidence established that "it was the practice in both Robinson's and Anderson's offices for waivers to be brought to the attention of Robinson and Anderson and when they determined the waivers should be signed, the physical act of signing was delegated to employees."

23. The Board erred in holding with respect to these waivers that the evidence showed "in each instance a waiver was requested by the respondent and it was pursuant to these requests that the waivers were signed and sent in by the petitioner."

24. The Board erred in refusing to exclude all other witnesses from the Court room while one was testifying.

25. The assessment of the additional tax against Herman C. Fleitmann was made on March 13, 1926 and on the evidence the Board erred in holding that said assessment was made on March 3, 1926.

26. The findings of the Board with respect to the waiver dated September 27, 1929 that Anderson's name was signed at his direction by a deputy collector are not supported by the evidence.

27. The Board erred in failing to hold that there were no sufficient consents in writing which would validate the assessment and collection of this tax.

28. The Board erred in failing to hold that the waiver of February 21, 1924, was void because its execution resulted from a mutual mistake.

28 Wherefore your petitioners pray that the Court may review the action and decision of the Board of Tax Appeals in this cause, reverse the decision of said United States Board of Tax Appeals and direct the entry of a decision by said Board in favor of your petitioners determining that there is no deficiency in income and profits taxes for the year 1918, and that no further taxes should be collected, and awarding to your petitioners such other and further relief as to the Court may seem just and proper.

RICHARD E. DWIGHT,
RICHARD E. DWIGHT,
Attorney for Petitioners,
100 Broadway, New York City, N. Y.

STATE OF NEW YORK,
City of New York,
County of —, ss:

Richard E. Dwight, being first duly sworn, says that he is counsel of record in the above-named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

RICHARD E. DWIGHT.

Subscribed and sworn to before me this 24th, day of November, 1931.

CHARLES J. McNALLY,
Notary Public.

Notary Public, Kings County.
Kings Co. Clk's No. 106, Reg. No. 2124.
N. Y. Co. Clk's No. 340, Reg. No. 2Mc205.
Commission expires March 30, 1932.
My commission expires — —, —.

29 Received March 23, 1932, U. S. Board of Tax Appeals.

United States Board of Tax Appeals. Lodged Mar. 23, 1932.

Filed March 25, 1932.

United States Board of Tax Appeals.

Docket No. 17121.

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Peti-
tioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Statement of Evidence.

At the hearings of the above-entitled cause on October 8th, 27th and 28th, 1930, before the Honorable C. Rogers Arundell, Member of the United States Board of Tax Appeals, the following evidence was offered and received.

Appearances:

Harry Friedmann, Esq., and William N. Wood, Esq., of Washington, and Richard E. Dwight, Esq., of New York City, N. Y., on behalf of the petitioners.

Bruce A. Low, Esq., and L. H. Rushbrook, Esq. (C. M. Charest, Esq., General Counsel of the Bureau of Internal Revenue), on behalf of the Commissioner of Internal Revenue, respondent.

It was moved by the petitioners that in view of the death of Herman C. Fleitmann, his executors, Marie J. J. Fleitmann and Thomas Crimmins, be substituted in his stead as petitioners. Respondent concurred and it was so ordered.

30 A stipulation was entered into between the parties agreeing to the following facts:

Herman C. Fleitmann filed his return for the year 1918 on March 15, 1919. An additional tax of \$70,608.70 was assessed on March 13, 1926. Petitioners were notified by mail of said assessment, by a deficiency letter dated April 20, 1926. The tax has not been paid. Petitioners rested.

A stipulation was entered into that all the evidence introduced in any of the three Fleitmann cases should be applicable to each case.

R. KEMP SLAUGHTER, being called by the respondent and having been duly sworn, testified as follows:

I represented Herman C. Fleitmann with respect to his tax liability for 1918 on February 13, 1924.

Respondent offered in evidence *a* letters dated February 13, 1924 and May 6, 1926 and signed by R. Kemp Slaughter. Witness identified the signature. The letter- *was* received and marked "Respondent's Exhibit T" and "Respondent's Exhibit R".

Respondent submitted to witness a carbon copy of a letter dated February 9, 1925 and purporting to have been signed by Herman C. Fleitmann and asked him to identify it. Witness continued his testimony.

I cannot identify that letter. There is a lot of correspondence in my file here just about that time which refers to the subject matter of that letter, but in no way identified it. The fact of the matter is that this matter was being handled by three different offices, Mr. Dwight, Patterson, Teal & Dennis, my accounting connections in New York and by my own office, myself personally in Washington. This letter was evidently prepared by our New York office for H. C. Fleitmann, but I cannot locate any reference to
31 it, and it has been so long ago. I have a memorandum made on February 12, 1925, in the following language:

"I saw Mr. Ringley and Mr. Thomas of his office this afternoon, and they assured me that a careful search of the file of Fleitmann & Company, audit 21, failed to locate the waivers which were received for December 30, for the years 1918 and 1919, executed by H. C. and W. M. Fleitmann.

"I then called Mr. Learner on the phone and gave reference to the consolidated returns symbols and requested him to examine that part of the case which was in his Unit. He did so and stated that he could not find record of the waivers. Ringley assured me that he would continue his search, and then I saw Miss Hines, Secretary to Mr. Allen, who advised me in accordance with the statement contained in my letter of this date to the New York office.

"Miss Hines is now making investigation to determine whether the tax has been actually listed with the Collector and the period of statutory limitations. If the assessment for 1918 has not been listed, and the statutory period will permit, she will suspend the list for a reasonable time in order that the investigation to locate the original waivers may be made.

"Miss Hines suggested that I call her on branch 473 to ascertain the result of her inquiry."

Mr. Low: I will ask you if after reading that correspondence it recalls to your memory whether or not an assessment was made on or about that time?

* * * * *

32 The Witness: My recollection is not quite clear, but my recollection is that we were having considerable trouble with the Department at this time trying to arrange for a conference to discuss the merits of these two cases. In the meantime the collector issued a distraint, which was of course conclusive that the assessment had been made, or rather of threatened distraint. There was no occasion for that, because waivers had been filed, and that brought about all those conferences with Mr. Ringley and other members of the Department in an effort to clear up that situation and relieve Mr. Fleitmann from further annoyance under this threatened distraint. That was eventually done. They did issue over-assessment certificates to the Collector and cancelled those assessments.

* * * * *

Mr. Low: I hand you photostat certified copy under date of December 24, 1924, and ask you if that is the waiver you referred to? (Respondent's Exhibit HH, Petitioners' Exhibit 3.)

The Witness: Yes, sir.

Mr. Low: Will you continue your story?

The Witness: That waiver was directed to the Commissioner of Internal Revenue in New York on December 29, 1924, and we hold registry receipt.

Mr. Low: Can you state whether or not an assessment was made regardless of whether or not that waiver was filed?

The Witness: Yes.

Mr. Low: What were the conditions surrounding that assessment?

The Witness: The waiver was not a matter of record in the Bureau of Internal Revenue, in the Washington Office. Apparently it had been overlooked by the collector. The tax was assessed and distraint threatened, and after
33 considerable correspondence and considerable conferences, quite a number of conferences with representatives of the Income Tax Unit, that assessment was withdrawn.

* * * * *

Mr. Low: Major Slaughter, I hand you letter dated February 19, 1925, purporting to be signed, and ask you if you signed that?

The Witness: Yes.

Mr. Low: And that related to the tax liability of H. C. Fleitmann for 1918, among other things?

The Witness: Yes.

Mr. Low: Does it refer to a telegram from your associates in New York?

The Witness: It refers to a letter enclosing letter of February 18, addressed to this office by the New York office making exception to the taxes.

Respondent offered in evidence the letter of February 19, 1925. Said letter was received and marked "Respondent's Exhibit U."

* * * * *

Mr. Low: You now hold in your hand a letter referred to as accompanying your letter of February 19, 1925, which is admitted as respondent's exhibit U. Is that correct?

The Witness: Yes.

Mr. Low: Is that letter from your associates in New York?

The Witness: Yes, sir.

Mr. Low: Does it relate to the tax liability of H. C. Fleitmann for 1918?

34 The Witness: It does.

Mr. Low: And pertains to the assessment that we have been discussing?

The Witness: Yes, sir.

Respondent offered said letter in evidence. It was received and marked "Respondent's Exhibit V."

* * * * *

Mr. Low: I am laying the foundation by a totally disinterested witness. If this witness can testify that personal service was one of the issues in the case of Fleitmann & Company, Incorporated, it will be one step in my proof.

The Member: It might be a step, but it is a right far step.

The Witness: I do know that the Seaboard Mills, it was a personal service classification issue before the Board. The case was tried by Mr. Dwight, and the Board ruled that it was not entitled to personal service classification. That determination affected the returns of Fleitmann & Company, as well as the returns of the individual prior to the time, because they were individual stockholders, I think, of Seaboard stock. To what extent I do not know, because that issue was never raised except incidentally.

Cross-examination by petitioners:

Mr. Friedman: You have been in the tax service for a number of years, have you not?

The Witness: Yes.

Mr. Friedman: Has it ever been the practice of the Commissioner of Internal Revenue or Bureau of Internal Revenue to forward the assessment list to the taxpayer?

35 The Witness: You mean the schedules of over-assessment?

Mr. Friedman: Yes.

The Witness: It is generally spoken of that he does not. I have never seen one, but I assume that is his practice. It is generally referred to——

Mr. Friedman: I did not believe you got my question. Did you as a representative of a taxpayer ever have the

Bureau of Internal Revenue send you one of those schedules?

The Witness: No.

Mr. Friedman: And as far as you know that was not the practice of the Bureau of Internal Revenue?

The Witness: To furnish taxpayers or their representatives with schedules or copies, no.

Mr. Friedman: Was it the practice of the Bureau of Internal Revenue to send the taxpayer a copy of the waiver or the waiver itself, after you had filed it with the Commissioner?

The Witness: I never had one sent to me in my practice or to any of my clients.

Mr. Friedman: As a tax practitioner, you were never informed who signed a waiver in any particular case?

The Witness: No, sir.

Mr. Friedman: When you filed waivers in this case you were never notified that somebody had signed it for the Commissioner, or the Commissioner signed it himself?

The Witness: I was not.

Mr. Friedman: And as a general practice tax representatives are not notified?

The Witness: That is true.

Mr. Friedman: Mr. Slaughter, I show you a group
36 of waivers filed in this case, and ask you whether or not you were ever notified by the Commissioner or the Bureau of Internal Revenue who, if anybody, executed them for or on behalf of the Commissioner—if you were notified who signed the Commissioner's name to those documents?

The Witness: No, sir; I do not. I was never interested enough to ask.

Mr. Friedman: Does that apply to all waivers filed in any of these Fleitmann cases?

The Witness: Yes, I do not recall ever seeing a waiver signed by the Commissioner or anybody under his supervision.

Mr. Friedman: After a waiver was filed you were never notified?

The Witness: That is correct.

Mr. Friedman: The last you see of a waiver or the last anybody sees of it is when you file it?

The Witness: Yes, that is true, and that is true in this case.

Mr. Friedman: That is all.

Redirect examination by respondent:

Mr. Low: In filing those waivers on behalf of the taxpayer, did you expect the Commissioner to rely upon them?

The Witness: I filed them in good faith and expected them to rely on them.

Mr. Low: And you expected to receive other considerations because you filed them?

The Witness: Yes, and got further consideration.

Mr. Low: State whether or not you continued to get consideration during all the time you represented
37 these taxpayers when they were in the Unit.

The Witness: Yes.

Mr. Low: I understand your answer to be during the period you represented these two taxpayers you received consideration from the Unit with reference to the appeal of Frederick T. and Herman C. Fleitmann for 1918.

The Witness: Let me see. Let me check up on that a little bit, because Mr. Dwight represented those two men, F. T. and H. C. Fleitmann, and I represented W. M. Fleitmann, and the issues in all three cases were very similar. All our conferences were held together, and I am not so sure whether I held power of attorney consistently through all that period for those two men. My appearance in the case was never questioned by the Department, I know. Neither was Mr. Dwight's appearance questioned by the Department in so far as W. M. Fleitmann was concerned. I will have to check up and verify that. It may be and I think probably the powers of attorney were given to each member of the firm of *the* Patterson, Teal and Dennis, and the firm of Hughes, Rounds, Sherman & Dwight. I was a member of the former firm.

Mr. Low: And as far as you know there never has been revocation?

The Witness: I think that is true.

Recross-examination by petitioners:

Mr. Friedman: When you filed these waivers with the Government I presume you expected them to carry out the law and have them properly executed, did you not?

The Witness: I did, yes, sir.

Mr. Friedman: When was the first time you learned, Major Slaughter, that there was any question about
38 the Commissioner's execution of these waivers?

The Witness: Well, I think that has been very recently brought to my attention since this proceeding has started I think.

Mr. Friedman: That is about the time the amended petition was filed in this case?

The Witness: Yes.

Mr. Friedman: Major, there has always been some controversy as to the correctness of the tax liabilities for the years 1918, 1920 and 1921 in the case of Herman C. Fleitmann, and the year 1918 in the case of Frederick T. Fleitmann?

The Witness: Yes, sir, those issues are still pending as a matter of record before this Board.

Mr. Friedman: And as representative of these taxpayers you have been constantly protesting the amounts of the tax?

The Witness: Since we failed to get any favorable adjustment of those tax matters, the issue as raised in the petitions originally drawn or any favorable action by the special advisory committee, I have had nothing further to do with those cases. The cases now on trial will be tried on their merits supplementing this proceeding, as I understand, by Mr. Dwight. My only interest in them terminated with those conferences in the special advisory committee. My own case, W. M. Fleitmann, was tried before this Board last week.

Mr. Friedman: That is all.

39 Respondent offered in evidence a photostatic copy of a waiver dated February 9, 1924. Said document was received and marked "Respondent's Exhibit FF."

Respondent offered in evidence a photostatic copy of a waiver dated February 21, 1924 and stamped "approved on February 8, 1926." Said document was received and marked "Respondent's Exhibit GG."

Respondent offered in evidence a photostatic copy of a waiver dated December 24, 1924, recorded December 30, 1924 and approved according to the stamp February 8,

1926. Said document was received and marked "Respondent's Exhibit HH."

Counsel for respondent called attention to the fact that the next waiver in the series had already been introduced into evidence. It covered the four years 1918-1921, was dated November 8, 1926 and was marked "Respondent's Exhibit C" in docket 28451.

Respondent offered in evidence a collection waiver dated September 27, 1929. It was received and marked "Respondent's Exhibit II." This was one of the two waivers to which, according to the testimony of John S. Shea, the name of Charles W. Anderson was signed by William J. O'Brien.

Respondent offered in evidence a photostatic copy of an assessment certificate for 1918 dated February Special 3, 1925 and in the amount of \$70,608.70. Said document was received and marked "Respondent's Exhibit JJ."

Respondent offered in evidence a photostatic copy of a certificate of overassessment in the amount of \$70,-
40 608.70 for 1918. Said document was received and marked "Respondent's Exhibit KK."

Counsel invited the Board's attention to the fact that it was admitted previously of record that this same amount, namely, \$70,608.07, was later assessed on special, number 16 for 1926.

Respondent offered in evidence claim for refund for \$13,357.05 filed by H. C. Fleitmann, January 23, 1924 and covering the year 1918. It was received and marked "Respondent's Exhibit LL."

Counsel for respondent then expressly referred to this case certain letters that had already been introduced in evidence in Docket 28451. They were:

Letter dated January 22, 1926 requesting waivers for 1918 and 1919. It was admitted in evidence in Docket 28451 as "Respondent's Exhibit F."

Letter dated December 20, 1924, requesting waivers for 1918 and 1919 of Herman C. Fleitmann. It was admitted in evidence in Docket 28451 as "Respondent's Exhibit G."

Letter dated November 5, 1926 requesting waivers for 1918 and 1919 of Herman C. Fleitmann. It was admitted in evidence in Docket 28451 as "Respondent's Exhibit H."

Respondent offered in evidence a copy of a letter dated February 6, 1925 addressed to Herman C. Fleitmann and pertaining to his tax liability for 1918. The letter bore certain notations in pen and pencil and these the respondent did not offer as part of the letter. Document was received and marked "Respondent's Exhibit MM."

Respondent offered in evidence a letter dated February 7, 1924 addressed to Herman C. Fleitmann and pertaining to his tax liability for 1918. Said letter was received and marked "Respondent's Exhibit NN."

41 Respondent offered in evidence a letter dated April 8, 1925 addressed to Collector of Internal Revenue and signed J. G. Bright, Deputy Commissioner by Mr. Clute, Head of Division. Said letter was received and marked "Respondent's Exhibit OO." It referred to tax liability of Herman C. Fleitmann for 1918.

Respondent offered in evidence a letter dated March 3, 1925, addressed to Collector of Internal Revenue, Customs House, New York. Said letter was received and marked "Respondent's Exhibit PP."

The above and foregoing statement of evidence together with exhibits appended hereto contain all the evidence introduced before the Board material to a consideration of the assignments of error as set forth in the petitioners' petition for review of the decision entered herein by the United States Board of Tax Appeals.

It is hereby agreed that said statement as made may be approved by the Board of Tax Appeals without further notice to any party hereto, and that when so approved may be filed in the Clerk's office and become a part of the record for the purpose of the petition for review in said cause filed by Marie J. J. Fleitmann and Thomas Crimmins, Executors of the Estate of Herman C. Fleitmann, Deceased, Petitioners.

HOWE P. COCHRAN,

Attorney for Petitioners.

(Signed)

C. M. CHAREST,

General Counsel, Bureau of Internal

Revenue, Attorney for Respondent.

Dated this 22 day of March, 1932.

42 The aforesaid statement of evidence in the petition for review by Marie J. J. Fleitmann and Thomas

STAMPED

U. S. BOARD OF TAX APPEALS

Docket No. 28451

Oct. 8, 1930

Petitioner's Exhibit 4.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Form 872 (Revised Jan. 1927)

INCOME AND PROFITS TAX WAIVER

FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1923

IT:CR:1-5
SMC

26
NOV 10 1926

HEAD OF DIVISION
November 8th, 1926

In pursuance of the provisions of existing Internal Revenue

Laws..... Mr. Herman C. Fleitmann....., a taxpayer

of..... New York, New York....., and the
Commissioner of Internal Revenue hereby waive the time prescribed by law
for making any assessment of the amount of income, excess-profits, or
war-profits taxes due under any return made by or on behalf of said tax-

payer for the year (or years)..... 1918 to 1921, inclusive.....
under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid
shall remain in effect until December 31, 1927, and shall then expire
except that if a notice of a deficiency in tax is sent to said taxpayer by
registered mail before said date and (1) no appeal is filed therefrom
with the United States Board of Tax Appeals then said date shall be ex-
tended sixty days, or (2) if an appeal is filed with said Board then said
date shall be extended by the number of days between the date of mailing
of said notice of deficiency and the date of final decision by said Board.

142'
Herman C. Fleitmann
Taxpayer

By.....

D. H. Blair
Commissioner JAC

If this waiver is executed on behalf of a corporation, it must
be signed by such officer or officers of the corporation as are empowered
under the laws of the State in which the corporation is located to sign
for the corporation, in addition to which, the seal, if any, of the
corporation must be affixed.

W. E.

Crimmins, Executors of the Estate of Herman C. Fleitmann, Deceased, Petitioners vs. Commissioner of Internal Revenue, Respondent, is hereby approved and signed and ordered to be made of record in the above-entitled cause this 25 day of March, 1932.

C. ROGERS ARUNDELL,
Member United States Board of Tax Appeals.

(Here follows Petitioner's Exhibit 4, side folio 43.)

44

RESPONDENT'S EXHIBIT T.

Filed Oct. 27, 1930.

Docket 28450.

Patterson, Teele, and Dennis, Accountants and Auditors,
815 15th St. N. W., Washington, D. C.

Arthur W. Teele, C. P. A.; John Whitmore, Harold F. Leeming, C. A.; F. R. Carnegie Steele, C. A.; James Willing, C. A.; William H. Stumpfel, Stanley G. H. Fitch, C. P. A.; Edward H. Moeran, David Leslie Milne, C. P. A.; Frank Lowson, C. A.; John W. Dawson, R. Kemp Slaughter, Harold B. Hart, C. P. A.

New York, 120 Broadway; Boston, 131 State St.; Washington, 1319 F St. N. W.

Cable Address: "Dignus".

(Stamped:) Personal Audit No. 2. Received Feb. 13, 1924.

February 13, 1924.

Mr. J. G. Bright,
Deputy Commissioner of Internal Revenue,
Treasury Department,
Washington, D. C.

Attention Mr. F. A. Garges.

DEAR SIR:

In accordance with our telephone conversation on February 9th, I now hand you income and profits tax waiver

for the taxable year 1918 properly executed by Mr. H. C. Fleitmann of Stamford, Connecticut, with offices at 356 Fourth Avenue, New York City.

It would appear that the recent assessment letter addressed to Mr. Fleitmann without the privileges of Section 250 (d) of the Revenue Act of 1921 was due to inability of the auditors in the Income Tax Unit to locate the original tax return of Mr. Fleitmann for the taxable year 1918. Mr. Fleitmann should not be made to suffer under a denial of the privileges of Section 250 (d) when he is not responsible for an omission or commission incident to the proper determination of his tax liability for the taxable year 1918.

In addition to the income and profits tax waiver I am also handing you herewith certified copy of power of attorney running to Martin J. Keogh, Jr. and power of attorney running to the undersigned under power of substitution contained in Mr. Keogh's power of attorney.

It is respectfully requested that with the duly executed waiver for the taxable year 1918 the Department grant Mr. Fleitmann the privileges extended to him by Section 250 (d) of the Revenue Act of 1921, and that the tax be not listed as proposed in the recent letter addressed to him by the Department.

Yours very truly,

P. KEMP SLAUGHTER.

Encs.

RKS:GS.

45

RESPONDENT'S EXHIBIT U.

Filed Oct. 27, 1930.

Docket 28450.

Patterson, Teele and Dennis, Accountants and Auditors,
815 15th St. N. W., Washington, D. C.

Arthur W. Teele, C. P. A.; John Whitmore, Harold F. Leeming, C. A.; F. R. Carnegie Steele, C. A.; James Willing, C. A.; William H. Stumpf, Stanley G. H. Fitch, C. P. A.; Edward H. Moeran, David Leslie Milne, C. P. A.; Frank Lowson, C. A.; John W. Dawson, R. Kemp Slaughter, Harold B. Hart, C. P. A.

New York, 120 Broadway; Boston, 131 State Street;
Baltimore, Continental Building; Washington, 815 15th St. N. W.

Cable Address: "Dignus".

February 19, 1925.

Mr. J. G. Bright,
Deputy Commissioner of Internal Revenue,
Treasury Department,
Washington, D. C.

Attention Mr. John J. Remey. Re H. C. Fleitmann,
Wm. M. Fleitmann. Taxable Years 1918 and 1919.
IT:CA:2112:10.

DEAR SIR:

We are inclosing herewith letter of February 18th addressed to this office by our New York office, taking exception to the taxes superficially assessed against the above named taxpayers for the taxable years 1918 and 1919. The taxpayers protest against these proposed additional taxes on the ground that they are erroneously assessed for the reason stated in this communication, and that the assessments should not have been made because proper waivers were filed with the Bureau under date of December 29, 1924. It is, accordingly, requested that the necessary steps be taken at once to correct the error of the Income Tax Unit by having these proposed assessment- removed from the assessment list. If any duplicate waivers for either one of the taxable years are necessary the under-signed will see that they are promptly filed. Immediate action is respectfully requested.

Very truly yours,

P. KEMP SLAUGHTER.

RKS:GF.

(Stamped:) Distribution Center, Section 24, Mar. 2, 1925.

46

RESPONDENT'S EXHIBIT V.

Filed Oct. 27, 1930.

Docket 28450.

Patterson, Teele and Dennis, Accountants and Auditors,
120 Broadway, New York.

Arthur W. Telle, C. P. A.; John Whitmore, F. R. Carnegie
Steele, C. A.; James Willing, C. A.; William H. Stumpfel,

Stanley G. H. Fitch, C. P. A.; Edward H. Moeran, David Leslie Milne, C. A.; R. Kemp Slaughter, Harold B. Hart, C. P. A.

New York, 120 Broadway; Boston, 1 Federal Street; Baltimore, Continental Building; Washington, 815 15th St. N. W.

Cable Address: "Dignus".

February 18, 1925.

Messrs. Patterson, Teele & Dennis,
815 15th Street N. W.,
Washington, D. C.

Re H. C. Fleitmann and William M. Fleitmann. Additional Taxes 1919-1919.

DEAR SIRS:

Referring to the Department's letters dated February 4th, 1925, and February 6, 1925, reference IT: CA: 2112: 10, claiming additional taxes as follows:

	1918	1919
H. C. Fleitmann.....	\$70,608.70	\$13,476.00
W. M. Fleitmann	19,138.98	.....

We beg to advise you that waivers were duly filed with the Department, 1924, because the taxable income of these gentlemen and consequently their tax liability for the years 1918 and 1919 cannot be established until the amended consolidated Returns of Fleitmann & Company, Inc. for these years have been finally passed. As you know the Corporation Returns are now before the unit, and one point which materially affects these individuals is now receiving consideration in the solicitors' office.

The point in question is whether all the dividends received and returned as income in the years 1918 and 1919, were correctly reported in view of the Department's action in including in taxable income profits prior to incorporation but turned over to the Corporation and declared as dividends.

The additional tax claimed is attributable in large part to the inclusion in taxable income of these profits without

W A I V E R

Respondents Ex 37

22

In pursuance of the provisions of Subdivision D of Section two hundred and fifty of the Revenue Act of Nineteen hundred and twenty-one, H. C. Fleitmann, of Stamford, Connecticut, with offices at 356 Fourth Avenue, New York City, and the Commissioner of Internal Revenue hereby consents to a determination assessment and collection of the amount of income, excess profits or war profit taxes, due under any return made by or on behalf of the said tax payer for the year 1918 under the Revenue Act of 1921 or under prior income, excess profits or war profits tax acts or under section thirty eight of the Act entitled "An Act to Provide Revenue, equalize duties and encourage the Industries of the United States and for Other Purposes" approved August 5th 1909. This Waiver is in effect for one year from the date it is signed by the tax payer.

In witness whereof I have hereunto set my hand this 9th day of February, 1924.

Signed in the presence of:-

Joseph Edmundson
Dallachaser

APPROVED FEB 15 1924

DATE

D. H. Blair

COMMISSIONER OF INTERNAL REVENUE

APPROVED

FEB - 5 1926

DATE

191

Same as Ex 2 attached
Amended Ans. to Amended Petition

L. C. A. M.
230
(See board meets here)

Feb 21st 1924
Date

23

INCOME AND PROFITS TAX WAIVER

4261 52831

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, H. C. G. Leitzman of Hawford House and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Hawford House for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

APPROVED

FEB 18 1926

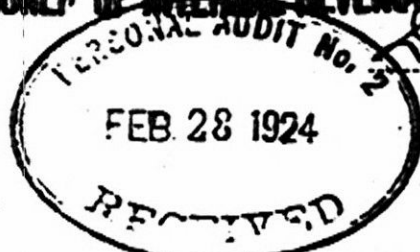
DATE

Taxpayer

COMMISSIONER OF INTERNAL REVENUE

By

Commissioner



If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Same as Ex 3 attached to Amended Ans.
to Amended Petition

IT:CA:2112:1C

New York, December 24th 1924.
(Date)

24

345
304
104

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of existing Internal Revenue Laws,
Mr. Herman C. Fleitmann a taxpayer,
of New York, N. Y. and the Commissioner
of Internal Revenue, hereby consent to extend the period prescribed by
law for a determination, assessment, and collection of the amount of
income, excess profits, or war-profits taxes due under any return made
by or on behalf of said taxpayer for the years 1918
under the Revenue Act of 1924, or under prior income, excess-profits,
or war-profits tax Acts, or under Section 38 of the Act entitled "An
Act to provide revenue, equalize duties, and encourage the industries
of the United States, and for other purposes", approved August 5, 1909.
This waiver is in effect from the date it is signed by the taxpayer and
will remain in effect for a period of one year after the expiration of
the statutory period of limitation within which assessments of taxes
may be made for the year or years mentioned, or the statutory period
of limitation as extended by Section 277 (b) of the Revenue Act of 1924,
or by any waivers already on file with the Bureau.

1918

Herman C. Fleitmann
Taxpayer

DEC 30 1924

By DISTRIBUTION CENTER
Feb 17. 1925
Commissioner SECTION 21

If this waiver is executed on behalf of a corporation, it must be
signed by such officer or officers of the corporation as are empowered
under the laws of the State in which the corporation is located to sign
for the corporation, in addition to the seal, if any, of the corporation must be affixed.

APPROVED

DATE

certified

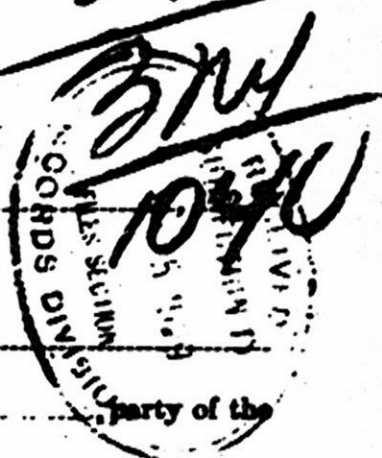
D. H. Blair
COMMISSIONER OF INTERNAL REVENUE

Same as by 5 attached to amended
ans. to amended Petition

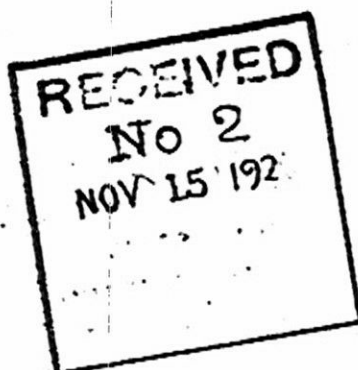
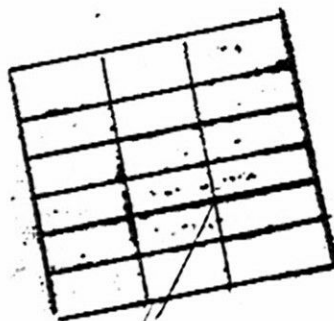
Form 900
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
January, 1925

TAX COLLECTION WAIVER

Sept 27
(Date)



It is hereby agreed by and between HERMAN C. FLEITMANN
of 356 Fourth Avenue, New York
first part, and the Commissioner of Internal Revenue, party of the second part, that the amount
of \$ 70,606.70, representing an assessment of Income tax
(Kind of tax)
for the year(s) 1918 made against the said party of the first part, appearing on
the 1926 N.A. Marsh assessment list, page 94 P, line 28426, for
the district of Third, New York, may be collected (together with such interest,
penalties, & other additions as are provided for by law) from said party of the first part by
distrainment or by a proceeding in court begun at any time prior to December 31, 1920



Herman C. Fleitmann
(Taxpayer)

By _____

Robert H. Lucas.

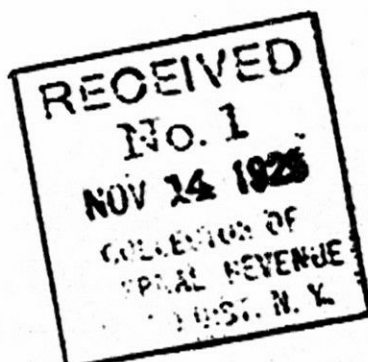
Commissioner of Internal Revenue.

By Phas H. Anderson
Collector of Internal Revenue.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

9-50204

U. S. GOVERNMENT PRINTING OFFICE: 1925



26

ASSESSMENT CERTIFICATE
COMMISSIONER'S ASSESSMENT LIST

3RD District of NEW YORK Month FEBRUARY SPECIAL #3 Year 1925

Additional Assessments made by Commissioner: PERSONAL 83 805 29
CORPORATION 1 360 52

Total Assessments \$ 85 165 81

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue, FEB 10 1925, 192

W. H. Ream
Commissioner of Internal Revenue.

No. 5655. Marie J. J. Flitmann, et al.,
vs. Appellants.
David Burns, Commissioner.

ASSESSMENT LIST. SPECIAL 3
 INCOME TAX FEBRUARY 1925

Page No. 0

District 3RD NEW YORK

INCOME TAX

FEBRUARY 1925

List

(Classification.)

		OLD BALANCE	DATE	DEBIT	CREDIT	NEW BALANCE	REMARKS
4	FLEITMANN HERMAN C 356 4TH AVE NEW YORK N Y FEB 04 P SPL 3					70608 70	1918 316100 RAR SEC 274 D OL 2/6/25
5							
6							
7							
8							
9	No. 5655. <i>Mrs. J. J. Fleitmann, et al.,</i> <i>vs. Appellants,</i> <i>David Burnet, Commissioners &c.</i>					83805 29	

47 excluding the dividends paid from such profits. In the case of H. C. Fleitmann, the status of the Seaboard Mills, Inc. is also involved. Our understanding is that the Returns of this Corporation are now being given consideration by the Relief Section, after a personal service status was denied by the tax unit, and after consultation with PA:PU: and PS Section.

At a conference with the unit at which Major Slaughter was present, it is our recollection that it was satisfactory to defer action on the individuals until final assessment was made in respect to the Corporations. It is clearly unreasonable to insist on collecting these assessments based on a Revenue Agent's report entirely incidental to such Agent's report on the Corporations, before taking final action on the latter.

Regarding the proposed additional assessment against Mr. H. C. Fleitmann for 1919, no opportunity has as yet been afforded to investigate and file exceptions. To secure such an opportunity, Mr. Fleitmann promptly filed the necessary waiver. However, only the 1918 additional taxes appear to have been listed, as we have received not demand notices in respect to the 1919 additional assessment.

We trust that the above, together with your general knowledge of the situation will be sufficient to satisfy the Department of the merit of our request to have the list of assessments withdrawn. We understand your telegram to mean that the Department no longer disputes the fact that waivers were duly filed. It is regrettable that we were unable to secure the cooperation of the Collector's office in respect to Mr. William M. Fleitmann's waiver for 1918, but will make a further effort tomorrow.

Please wire us as soon as possible regarding developments.

Very truly yours,

PATTERSON, TELLE & DENNIS.

DIM/CW.

(Here follow Respondent's Exhibits FF, GG, HH, II, JJ, side folios 48, 49, 50, 51, 52, and 53.)

Filed Oct. 28, 1930.

Docket 28450.

Certificate of Overassessment.

Treasury Department, Office of Commissioner of Internal
Revenue, Washington.

Income Tax Unit.

IT: R: CC.

Number: 833,813.

Allowed: \$70,608.70.

Schedule No. 14451.

Mr. Herman C. Fleitmann,
356 Fourth Ave.,
New York, N. Y.

SIR:

An audit of your income tax return, Form 1040 and a consideration of all the claims (if any) filed by you for the year 1918 indicates that the tax assessed for this year was in excess of the amount due:

Tax assessed Account #316100.....	\$41,948.42
Tax assessed, amended return, Account #303120	8,581.56
Tax assessed February 1925, Page o, Line 4, Spl. 3	70,608.70
Total tax assessed.....	\$121,138.68
Less refund 9/21/23	36,124.28
Outstanding assessment	\$85,014.40
Tax Assessable	14,405.70
Overassessment	\$70,608.70

Since you have filed a waiver for the year 1918 the tax of \$70,608.70 had been overassessed.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Respectfully,

J. G. BRIGHT,
Deputy Commissioner,
By F. R. CLUTE,
Head of Division.

Abated: \$70,608.70.

Credited: —.

Year: —.

Account No. Feb. 04P Sp-3.

Wash. 1925.

Refunded: —.

(Stamped:) Instructions Executed. Signature: Chas. W. Anderson, Collector Int. Rev., 3rd District of New York. (7776) Revised July, 1923.

55

RESPONDENT'S EXHIBIT LL.

Filed Oct. 28, 1930.

Docket 28450.

Claim For

Abatement of Tax Assessed,

Credit Against Outstanding Assessments,

xRefund of Taxes Illegally Collected,

Refund of Amounts Paid for Stamps Used in Error or
Excess.

Important.—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

935.

6—5655a

Notice to Collector: Collector must indicate in block above the kind of claim, except in Income Tax cases.

(Stamped:) Recorded Jan. 30, 1924, Claims Control Section.

Collector's Notation: District: ——. Account Number: ——. Date received: Collector of the Internal Revenue Received Jan. 23, 1924, 2nd Dist. N. Y. ———, Collector of Internal Revenue. 574,083.

STATE OF NEW YORK,

County of New York:

H. C. Fleitmann, Esq. (Residence—give street and number as well as city or town and State), #356 Fourth Avenue (Business address), New York, N. Y.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Period: From Jan. 1, Year: 1918.

2. Character of assessment or tax: Personal Income Tax #316,100, to Dec. 31, 1918. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased as determined by dept.: \$14,405.70.

4. Reduction of Tax Liability requested (Income and Profits Tax): \$13,357.05.

5. Amount to be abated: \$——.

6. Amount to be refunded (or such greater amount as is legally refundable): \$13,357.05.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): See Treasury Dept. Certificate of Overassessment #262,333, dated Nov. 9, 1923. (If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: 2nd New York.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: \$——.

11. Unpaid assessment against which credit is asked: Period from ——.

56 Deponent verily believes that this application should be allowed for the following reasons: See Rider Attached Hereto.

(Attach add-tional sheets if necessary.)

Sworn to and subscribed before me this 22nd day of January, 1924.

(Signed)

H. C. FLEITMANN.

(Signed)

ARTHUR H. RYAN.

(Stamped:) Notary Public, New York County, No. 222. New York Register No. 4048. Commission Expires March 20, 1924.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

57 I Certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Claim No. —.

Name of Taxpayer: —.

Character of assessment and period covered: —; List: —; Year: 1918; Month: —; Page: —; Line: —; Amt.: —; Date paid: —; District in which paid: —.

_____,
Collector of Internal Revenue.

_____,
Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued: —; Kind: —; Number: —; Denomination: —; Date of sale or issue: —; (if special tax stamp, state:) Amount: —; Serial number: —; Period Commencing: —.

_____,
Collector — District.

(Stamped:) Rejected. 3305. I. T. Schedule.

Schedule No.: —.

Schedule Number: —.

Allowed or Rejected Number: —.

District: —.

(Nature of Tax: —.)

Claimant: — —.

Address: —.

Examined and submitted for action — —, 19—.

COMMITTEE ON CLAIMS.

Claim examined by: — —.

Claim approved by: — —.

Chief of Division: — —.

Amount claimed: \$—.

Amount allowed: \$—.

Amount rejected: \$13,367.05.

58 1. Because Fleitman & Co. Inc. on October 27, 1923 filed with the Internal Revenue and Amended Return in consolidation with Fairmont Manufacturing Company for the period May 24, 1918 to December 31, 1918. The Amended Return differed from the original return of Fleitmann & Co. Inc. in that the latter return was filed by Fleitmann & Co. Inc. without due consideration of its right to file a return in consolidation with the Fairmont Manufacturing Company by virtue of ownership and control of over 97% of the outstanding voting stock of the latter Company. Furthermore, Fleitmann & Co. Inc. incorrectly filed its first return (single return basis) as if in existence since January 1, 1918. Fleitmann & Co. was incorporated May 24, 1918 and acquired the business of Fleitmann & Co. (a partnership) as of January 1, 1918. The partnership received stock for their interest in the business as of January 1, 1918 and the Corporation assumed all the liabilities of the firm. In electing to file their first return for a twelve months' period, Fleitmann & Co. Inc. overlooked the fact that its corporate net income for 1918 was less than 20% of its invested capital, and in such case, under the Revenue Act of 1918, it was estopped from filing a return for the full calendar year.

2. Because in the year 1918 the dividend policy of Fleitmann & Co. Inc. was erroneously based on the assumption that all the profits of the year 1918 represented earned surplus and that all dividends were ordinary dividends and therefore taxable to the individual stockholders, whereas, the Amended Return recently filed shows that certain of such dividends received by me from Fleitmann & Co. Inc.

represent a return of surplus or capital paid in to the Company at the time of its incorporation, namely May 24th, 1918 and in computing invested capital for the purpose of the Amended and Consolidated Return, these dividends were charged against the paid in surplus as in excess of available earnings.

59 3. Because my proportion of the dividends paid by Fleitmann & Co. Inc. from its paid in surplus was \$54,599.57 which I now claim to be exempt from taxation, but, on which, I have paid surtaxes in the amount of \$13,357.05. This refund is arrived at as follows:

Block Adjustments.

Block.	As per off. of overassessment		Income adjusted for basis of present claim.
	#262,333, IT:CA: PU-2305. dated Nov. 9, 1923.	Adjustments.	
B. Salaries	66,078.39	.....	66,078.39
C. Partnerships, etc.....	.....	.....	.....
D. Sale of Property.....	3,679.75	.....	3,679.75
G. Interest	554.71	.....	554.71
	<u>70,312.85</u>	.....	<u>70,312.85</u>
I. Interest, Taxes, etc.....	83,702.79	A 750.00	84,452.79
	<u>13,389.94</u>	750.00	<u>14,139.94</u>
J. Subject to Normal Tax....	13,389.94		14,139.94
Ka. Dividends	92,326.00	B 54,599.57	37,726.43
	<u>78,936.06</u>	55,349.57	<u>23,586.49</u>
L. Subjects to Surtax.....	78,936.06		23,586.49
	<u>14,405.70</u>	.....	<u>1,048.65</u>
Normal Tax on J.....	14,405.70	.....	1,048.65
Surtax on L.....	1,048.65	.....	.....
Refund now claimed....	13,357.05		

A. Additional Donations—allowed by Field Agent in report of August 4th, 1923.

B. Proportion of Dividends received from Fleitmann & Co. Inc. considered as a return of capital inasmuch as Fleitmann & Co. Inc. did not have sufficient earnings at the time to meet dividend requirements. Fleitmann & Co. Inc. on their Amended and Consolidated Return for 1918 has treated such dividends as a reduction of invested Capital.

4. Reference is made to report of Field Agent, dated August 4th, 1923, concerning my 1918 return and my letter of October 29th, 1923, addressed to Commissioner of Internal Revenue, concerning said report of Field Agent.

5. Reference is also made to Treasury Department's Certificate of Overassessment No. 262333, file IT:CA:PU:2305,

dated Washington, November 9, 1923 reducing my 1918 income tax from \$41,948.42 to \$14,405.70.

60 6. Reference is also made to a recent ruling of the Treasury Department, C. B. II-1, page 208; I. T. 1602, which reads in part, as follows:

“It is held that the net income for the year 1921, determined after providing for depreciation and depletion and also for an accrual of income and excess profits taxes for the year, should be prorated over the year from January 1st, 1921 to date of the payment of the dividend made in October 1921, in order to determine the amount available for distribution to the stockholders. Any excess of the dividend over the amount of surplus from previous years and of current earnings is a return of capital in a corresponding amount.”

Inasmuch as Fleitmann & Co. Inc. commenced business as of May 24th, 1918 it had not earned surplus and, therefore, dividends paid in excess of earnings of the taxable year must, without doubt, be considered a return of capital assigned to the corporation from the predecessor partnership at May 23rd, 1918.

61 (Stamped:) Mailed Feb. 6, 1925.

(Stamped:) Received Feb. 10, 1925, Claim Control Section.

Statement.

IT:CA:2112-1C.

In re Herman C. Fleitmann, 356 Fourth Ave., New York, N. Y.

Year.	Deficiency.
1918	\$70,608.70

The report of the revenue agent covering his investigation of your books of account and records for the year 1918 has been accepted with the exception that the amount of tax previously assessed is \$14,405.70 instead of \$14,215.70.

Since you failed to renew your waiver for 1918, the tax will be assessed immediately.

Your claim for the refund of \$13,357.05 income tax will therefore be rejected.

(Signed)

F. R. CLUTE.

(Stamped:) Rejected. 3305. L. TL. Schedule.

(Signed) AR., JJM., 2/16/25.

62

RESPONDENT'S EXHIBIT MM.

Filed Oct. 28, 1930.

Docket 28450.

(1640M.)

Form NP-3.

(Stamped:) Mailed Feb. 6, 1925.

6085.

IT:CA:2112-10.

Herman C. Fleitmann,
356 Fourth Ave.,
New York, N. Y.

SIR:

In accordance with the provisions of Section 274 (d) of the Revenue Act of 1924, there has been assessed against you an income and excess profits tax amounting to \$70,608.70 for the taxable year 1918, the details of which are set forth in the attached statements.

Under the provisions of Section 279 (a) of the Act you have the right to file with the Collector of Internal Revenue, within *then* days after notice and demand for payment, a claim for abatement of this tax or any part thereof. The claim should have attached to it all evidence and data upon which you rely in support thereof, and should be accompanied by a bond not exceeding double the amount of the claim, with such sureties as the Collector deems necessary. When the claim is received by the Collector it will be transmitted to the Commissioner of Internal Revenue, Washington, D. C., who will notify you of the action taken.

Respectfully,

(Signed)

J. G. BRIAN,
Deputy Commissioner.

Enclosures: Statements.

Taxpayer given opportunity to sign waiver but has not done so.

N. E. W. W. L. G., 1/30/25. E. O., 1/5. C. A. R., C. W. G., 1/30/25. M. A. H., 2/2/25. R. M.

63 (Stamped:) Mailed Feb. 6, 1925.

Statement.

IT:CA:2112-10.

In re Herman C. Fleitmann, 356 Fourth Ave., New York,
N. Y.

Year.	Deficiency.
1918	\$70,608.70

The report of the revenue agent covering his investigation of your books of account and records for the year 1918 had been accepted with the exception that the amount of tax previously assessed is \$14,405.70 instead of \$14,215.70.

Since you failed to renew your waiver for 1918, the tax will be assessed immediately.

Your claim for the refund of \$13,357.05 income tax will therefore be rejected.

64 RESPONDENT'S EXHIBIT NN.

Filed Oct. 28, 1930.

Docket 28450.

(Stamped:) Mailed Feb. 2, 1924.

IT:PA-2.

LHD-205.

Mr. H. C. Fleitmann,
356 Fourth Ave.,
New York, N. Y.

SIR:

An examination of your income tax return, and of your books of account and record for the year 1918 discloses an additional tax liability of \$70,798.70, as shown by the Revenue Agent's Report dated January 7, 1924.

It will be impracticable to give you the usual thirty days' notice of the proposed adjustments in view of the expiration at an early date of the five-year period provided in Section 250 (d) of the Revenue Act of 1921, within which additional assessments may be made. Assessment of the tax will, therefore, be entered immediately in order that the interests of the Government may not be jeopardized, but payment of the tax should not be made until a bill is re-

ceived from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Since you have not been given thirty days within which to submit an appeal, you are advised that within ten days after receipt of notice and demand of payment, you may file with the Collector of Internal Revenue a claim on Form 843, for abatement of the amount which you consider represents an excess assessment. If the claim is filed, it should set forth in detail all facts pertaining to the case, and should be accompanied by the enclosed carbon copy of your letter. The claim for abatement may, at the discretion of the Collector, act as a stay to the collection of the tax, but in the event of an adverse decision, interest will be added at the rate of one-half of one per cent a month, on the amount rejected until paid.

You are also advised that you may protect your rights by paying the tax under written protest and immediately filing with the Collector a claim on Form 843 for refund or credit of the amount which you consider represents an excess assessment. If all, or any portion of such claim for refund or credit is allowed, interest at the rate of one-half of one per cent will be paid you on such amounts from the date paid to the date of allowance.

Respectfully,
(Signed)

J. G. BRIGHT,
Deputy Commissioner.

Enclosure: Form 843.

65

RESPONDENT'S EXHIBIT OO.

Filed Oct. 28, 1930.

Docket 28450.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:CA:2112-10.

(Stamped:) Apr. 8, 1925.

Collector of Internal Revenue,
Custom House,
New York, N. Y.:

Reference is made to office letter dated March 3, 1925, in which you were requested to withhold collection of tax as-

sessed against Wm. M. Fleitmann amounting to \$19,138.98 and against H. C. Fleitmann amounting to \$70,608.70 for the year 1918 for a period of thirty days provided the interests of the government were not jeopardized.

You are advised that certificates of overassessment are being prepared and will reach you in due course.

J. G. BRIGHT,
Deputy Commissioner,
By F. R. CLUTE,
Head of Division.

(Stamped:) Office of the Collector Internal Revenue, 2nd District N. Y. Received Apr. 10, 1925.

66

RESPONDENT'S EXHIBIT PP.

Filed Oct. 28, 1930.

Docket 28450.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:CA:2112—10.

(Stamped:) Mar. 3, 1925.

Collector of Internal Revenue,
Custom House,
New York, N. Y.:

The following assessments were listed under the provisions of Section 274 (d) in order to protect the Government against the expiration of the statutory period within which assessments can be made for the year 1918:

W. M. Fleitman, \$19,138.98, February List, Spec. 2, Page O, Line O.

H. C. Fleitman, \$70,608.70, February List, Spec. 3, Page O, Line 4.

Waivers have now been received, and inasmuch as these cases are linked with returns of a corporation, the final audit of which is not yet complete, it is suggested that you with-old collection for a period of thirty days provided the government's interest is not jeopardized. Certificates of

Overassessment for the entire amounts will be prepared and will reach you in due course.

D. H. BLAIR,
Commissioner.

(Stamped:) Office of the Collector Internal Revenue, 2nd District N. Y. Received Mar. 6, 1925.

67 United States Board of Tax Appeals. Filed Mar. 29, 1932.

United States Board of Tax Appeals.

Docket No. 17121.

MARIE J. J. FLEITMANN & THOMAS CRIMMINS, Executors of the Estate of Herman C. Fleitmann, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe for Record.

(Filed — — —.)

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals of the District of Columbia, with reference to petition for review heretofore filed by the petitioners in the above cause, a transcript of record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals as follows:

(a) Amended Petition.

(b) Amended Answer to Amended Petition. Omit Exhibits 1 to 5 inclusive. Insert statement that they are the same as Respondent's Exhibits FF, GG, HH, in
68 Docket 28450, Petitioners' Exhibit 4 in Docket 28451 and Respondent's Exhibit II in Docket 28450 respectively.

(3) The findings of fact and opinion of the Board of Tax Appeals.

- (4) Stipulation of Tax Liability.
- (5) The decision of the Board.
- (6) Stipulation for Review by United States Court of Appeals of District of Columbia.
- (7) The petition for review.
- (8) The statement of evidence with the following exhibits in Docket 28450: Respondent's T, U, V, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO and PP. (In all cases omit certifications.)
- (9) This Præcipe.

HOWE P. COCHRAN,
HOWE P. COCHRAN,
Attorney for Petitioners, 920 Potomac Electric Power Company Building, Washington, D. C.

Service of a copy of the foregoing is hereby acknowledged this — day of —, 193-.

— — —,
*General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.*

69 Docket No. 17121.

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Petitioner-,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 66, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 12th day of April A. D. 1932.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

70 United States Board of Tax Appeals.

Docket No. 17121.

MARIE J. J. FLEITMANN & THOMAS CRIMMINS, Executors of
the Estate of Herman C. Fleitman-, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence
and transmission and delivery of the record *sur* petition
for review of the above entitled proceeding in the Court of
Appeals for the District of Columbia, be and it is hereby
extended to March 26, 1932.

(Signed)

LOGAN MORRIS,

Member.

Dated Washington, D. C., Jan. 19, 1932.

A true Copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

71 United States Board of Tax Appeals.

Docket No. 17121.

MARIE J. J. FLEITMANN & THOMAS CRIMMINS, Executors of
the Estate of Herman C. Fleitman, Petitioner-,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioners, it is

Ordered: That the time for preparation of the evidence
and transmission and delivery of the record *sur* petition
for review of the above entitled proceeding in the Court

of Appeals for the District of Columbia, be and it is hereby extended to April 15, 1932.

(Signed)

LOGAN MORRIS,
Member.

Dated Washington, D. C., Jan. 19, 1932.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 5655. Marie J. J. Fleitmann & Thomas Crimmins, executors of the estate of Herman C. Fleitmann, appellants, vs. David Burnet, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Apr. ~~15~~, 1932. Henry W. Hodges, clerk.

13,

NOV 28 1932

Henry W. Hodges

Court of Appeals of the District of Columbia ^{CLERK}

No. 5655.

MARIE J. J. FLEITMANN and THOMAS CRIMMINS,
Executors of the Estate of Herman C. Fleitmann,
Deceased,

Petitioners,

against

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

RICHARD E. DWIGHT,
Attorney for Petitioners.

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Court of Appeals of the District of Columbia

MARIE J. J. FLEITMANN and THOMAS
CRIMMINS, Executors of the Estate
of Herman C. Fleitmann, Deceased,
Petitioners,

against

DAVID BURNET, COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

No. 5655.

BRIEF FOR PETITIONERS.

Statement of the Case.

The petitioners, as executors of the estate of Herman C. Fleitmann, deceased, seek in this Court review of a decision of the United States Board of Tax Appeals entered June 3, 1931, determining a deficiency in the income tax of Herman C. Fleitmann, deceased, for the year 1918 in the amount of \$36,936.08 (R. 16-17).^{*} This proceeding was instituted in the Board of Tax Appeals by Herman C. Fleitmann, who died before the hearing, and on motion at the hearing the petitioners were substituted as parties in his stead (R. 25). The findings and opinion of the Board of Tax Appeals, promulgated April 20, 1931 (R. 12), are reported in 22 B. T. A. 1231.

^{*} This case, No. 5655, and Cases Nos. 5656 and 5657, were tried together and will be argued together. In the citations of the record in this brief, "R." refers to the record in this case, "R.1" to that in No. 5656, and "R.2" to that in No. 5657. By virtue of stipulations made at the hearing, the evidence in each case may, so far as applicable, be regarded as evidence in the other two (R. 26; R.1 42; R.2 43).

This case is brought to this Court by a petition for review filed November 27, 1931 (R. 18-24), pursuant to Sections 1001, 1002 and 1003 of the Revenue Act of 1926 (44 Stat. 109-110), as amended by Section 603 of the Revenue Act of 1928 (45 Stat. 873), and a stipulation as to venue (R. 17-18).

An additional tax for the year involved in this case in the amount of \$70,608.70 was assessed on March 13, 1926 (R. 25). The Commissioner of Internal Revenue, hereinafter called the Commissioner, gave notice of this assessment in a deficiency letter (R. 8-9) which was mailed on April 20, 1926 (R. 25). This proceeding was instituted in the Board of Tax Appeals to contest the correctness of the additional assessment (R. 4-8).

The only question presented to this Court is whether the statute of limitations barred the assessment and collection of so much of the additional assessment as was found by the Board of Tax Appeals to constitute a deficiency.

The return was filed on March 15, 1919 (R. 12, 25), and, therefore, the period of limitation upon assessment and collection expired on March 15, 1924, unless it was extended by waivers (Revenue Act of 1921, §250 (d)).

The respondent relies upon the following waivers:

(1) Assessment and collection waiver dated February 9, 1924, expiring February 9, 1925, signed with the name of the Commissioner by a Mr. Lewis on February 13, 1924 (R. 12, 32, 39).

(2) Assessment and collection waiver dated February 21, 1924, to "remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within

which such assessments of taxes may be made for the year or years mentioned," signed with the name of the Commissioner by a Mr. Lewis on February 8, 1926 (R. 12, 32, 39).

(3) Assessment and collection waiver dated December 24, 1924, to "remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitation as extended by section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau," signed with the name of the Commissioner by a Mr. Lewis on February 8, 1926 (R. 13, 32-33, 39).

(4) Assessment waiver dated November 8, 1926, expiring December 31, 1927, signed with the name of the Commissioner by a Miss Van Amburg, as follows: "D. H. Blair, Commissioner, H. B. R." (R. 13, 33, 35; R.² 32, 40, 44).

(5) Collection waiver dated September 27, 1929, expiring December 31, 1930, signed with the name of the Commissioner by a Mr. O'Brien, as follows: "Robert H. Lucas, Commissioner of Internal Revenue" (R. 13-14, 33, 39; R.¹ 49).

The Commissioners whose names were signed to the waivers of November 8, 1926, and September 27, 1929, respectively, could not testify that they had ever seen the respective waivers before the trial (R.¹ 41, 42; R. 11, 35, 39). There is no direct testimony with respect to the circumstances attending the actual signing of either of these waivers. The evidence relied upon by the respondent to show these circumstances is entirely evidence of custom.

Miss Van Amburg, who signed the Commissioner's name to the waiver of November 8, 1926, was secretary to Henry B. Robinson (R.¹ 50; R.² 34, 40), whose initials appear on the waiver (R. 35; R.¹ 47; R.² 33). Mr. Robinson was head of a division of the Bureau of Internal Revenue, and the waiver was signed in his division (R. 13, 35; R.² 32, 33, 44).

At the time when this waiver was signed, there was in force an order of the Commissioner which was, in part, as follows:

“Any waiver received from a taxpayer shall be referred to the head of division in which the case is under consideration, who will determine whether it is acceptable. If a division in which the waiver is received does not have the return for the taxable year covered by the waiver, it shall be forwarded to the office of the Head of Records Division” (R.¹ 74).

Mr. Robinson had written authority from the Commissioner, as follows:

“Until further notice, you are hereby authorized to sign my name to all waivers which have been or may hereafter be submitted in connection with assessments for 1922 and prior years. In each case, however, your initials should appear immediately under this signature” (R.² 38, 44).

Miss Van Amburg had no authority from the Commissioner to sign waivers (R.¹ 51). Mr. Robinson testified that he was the only one in his division with the initials “H. B. R.” who had authority from the Commissioner to sign waivers (R.² 33). He also testified:

“Eight men in my division are now authorized to sign waivers. The number of waivers was so

great that it was necessary to have additional men.

* * * * *

“The additional men were authorized to sign waivers in the latter part of 1927 or early part of 1928. They were authorized directly by the Commissioner” (R.¹ 47).

Commissioner Blair testified:

“I delegated authority for signing to all of the heads of division, all the collectors of internal revenue, all of the agents in charge and perhaps some others. The delegation of authority to the persons named was essential to the conduct of the Government’s business. I delegated such authority to as many people as I thought advisable. I suppose I could have delegated it to everybody, but whenever it was necessary and it was suggested to me that I designate such and such a person, I did it. Those so delegated were principally men in responsible positions. It was an important matter and I took care to whom I delegated it” (R.² 40).

Mr. Robinson testified that he adopted and approved the signing of waivers by his secretaries (R.² 35), although he also testified that he did not recall having seen the waiver involved in this case before the day of the hearing (R.² 37).

Miss Van Amburg was unable to testify about the circumstances under which she signed this waiver (R.² 41).

The custom in Mr. Robinson’s office with reference to signing waivers is described in his testimony as follows:

“Q. Mr. Robinson, will you outline briefly the custom and routine with reference to waivers during the period involved in this case, and these particular waivers I refer to are dated February 18,

1926, and November 18, 1926. A. Waivers coming in which were in great number were all brought to me for the purpose of seeing whether they met the requirements of the Bureau, and for the necessary signatures to record their acceptance.

“Q. State whether or not you issued instructions to those in your office or under your supervision, with reference to whether or not waivers should be brought to your desk. A. I issued instructions that they be brought to my desk.”

“The instructions were not in writing. So far as I know they were never disregarded. As a rule the waivers were signed at my desk. My desk was a large double desk and the person signing waivers sat opposite me at the desk.

“By Mr. Low:

“Q. State what authorization you did give those people who signed waivers for you? A. I merely directed for them to affix the name my initials for me, and that was only in those instances where the number of waivers were so great the necessity for having expeditious action on them was apparent.”

* * * * *

“Q. In stating the waivers were brought to your desk, as I understood your testimony, for the purpose of determining whether or not they should be accepted, who exercised that function? A. I did” (R.¹ 44-45).

* * * * *

“My recollection is that I saw all the waivers that came into my division. They came to my office and almost always came to my desk as I recall” (R.² 39).

The only written authority to sign waivers on behalf of the Commissioner which Collector Anderson had at the time when the waiver of September 27, 1929, was

signed was contained in A. & C. Mimeograph, Coll. No. 3459, dated August 20, 1926 (R.¹ 23, 74-77), and IT-Mimeograph, Coll. No. 3606, dated February 28, 1928 (R.¹ 77-80). The material portion of the first mimeograph is as follows:

“It will be noted that the law requires that the waivers should be signed by the Commissioner and the taxpayer, or, in the case of estate or gift tax, the executor. In order to obviate the necessity of sending collection waivers to Washington for the signature of the Commissioner, authority is hereby delegated to Collectors of Internal Revenue to sign such waivers in the name of the Commissioner as follows:

D. H. BLAIR,
Commissioner of Internal Revenue,

By,

Collector of Internal Revenue” (R.¹ 76).

The second mimeograph contains a paragraph practically identical with the foregoing paragraph.

There is no evidence that Mr. O'Brien, who signed the waiver, had any authority from the Commissioner to sign waivers. The only evidence of the circumstances under which the waiver was signed was the testimony of Mr. Shea, an employee in Collector Anderson's office, who testified with respect to the custom in the Collector's office with respect to signing waivers, as follows:

“I am familiar with the custom and routine in the Collector's office. Waivers are usually brought up to the front office to my desk along with other important mail and all matters of that character are carried in to the Collector for his scrutiny, generally by me in person or by a stenographer. The Collector usually goes over them to ascertain

whether or not they are properly executed. He directed me to sign them.”

* * * * *

“Of my own knowledge I would say that that was the procedure we religiously followed.”

* * * * *

“Yes, we usually followed the proper practice in this sort of thing.” (R.¹ 49, 50.)

With respect to Mr. O’Brien’s act in signing the waiver of September 27, 1929, he testified that Mr. O’Brien would not deviate from the custom and that in all probability he proceeded in the usual way by taking the waiver to the Collector, but admitted that he did not know whether or not Mr. O’Brien had done so in this instance (R.¹ 49, 50).

In a letter to Collector Anderson dated December 21, 1929, the Commissioner purported to ratify and adopt all of the Collector’s prior actions in signing the name of the Commissioner to waivers under the authority previously given him (R.¹ 23, 84-85). There is no evidence of any ratification by the Commissioner of the actions of Mr. Robinson in connection with the signing of waivers.

The waiver of December 24, 1924, was executed by the taxpayer in response to a written request, signed in the name of a Deputy Commissioner by a Chief of Section, which contained the following language:

“You are advised that the records of this office indicate that a waiver had been filed for the year 1918, extending for a year, the time within which assessments may be made. Inasmuch as the time as extended by the waiver for 1918 is about to expire, you are requested to sign the enclosed Form of Waiver for 1918, and an additional waiver for the year 1918, in order to avoid the necessity

of making an assessment prior to the consideration of all the information submitted (R. 13; R.² 46-47).

The waiver of November 8, 1926, was executed by the taxpayer in response to a written request, signed in the name of an Assistant to the Commissioner by a Chief of Section, which contained the following language:

“An examination of your case indicates that the period of limitations prescribed by law or as extended by a waiver now on file, will presently expire and bar any additional assessment against you for the calendar years 1918 to 1921, inclusive, unless you consent to extend further the period of limitation. It is desired to give you an opportunity to present any evidence or contentions relative to the determination of your correct tax liability, but the Bureau will be obliged to protect the interests of the Government by notifying you of its final determination of any deficiency unless you furnish waivers in proper form.

“It is, therefore, suggested that you execute and return to this office within ten days from the date of this letter the enclosed forms of waiver * * *” (R. 13, R.² 47-48).

For the convenience of the Court the dates and certain other facts relating to the applicability of the statute of limitations are summarized below:

Return filed—3/15/19.
 Five year period ended—3/15/24.
 Additional tax assessed—3/13/26.
 Deficiency letter mailed—4/20/26.

W A I V E R S.

	<i>Date of Waiver</i>	<i>Date of Expiration</i>	<i>Date Commissioner's Name Signed</i>	<i>Person Signing Commissioner's Name</i>
(1)	2/ 9/24	2/ 9/25	2/13/24	Mr. Lewis
(2)	2/21/24	One year after expir a t i o n of any waivers al- ready on file.	2/ 8/26	Mr. Lewis
(3)	12/24/24	One year after expir a t i o n of any waivers al- ready on file.	2/ 8/26	Mr. Lewis
(4)	11/ 8/26	12/31/27	Not shown	Miss Van Amburg
(5)	9/27/29	12/31/30	Not shown	Mr. O'Brien

The statutes involved in this case are included among those set forth in the appendix to the brief in Case No. 5656.

Assignments of Error.

The assignments of error set forth in the petition for review (R. 21-24) which are relied upon by the petitioners may be summarized as follows:

1. The Board erred in entering judgment for the Commissioner.

2. The Board erred in approving and redetermining the deficiency found by the Commissioner.

3. The Board erred in failing to hold that the assessment against Herman C. Fleitmann was barred by the statute of limitations at the time it was made.

4. The Board erred in failing to hold that the collection of the tax assessed against Herman C. Fleitmann was barred by the statute of limitations at the time of the decision by the Board.

5. The Board erred in failing to hold that on the evidence the burden of proof was on the respondent in this case to prove that the period of limitations had been extended by valid waivers.

6. The Board erred in holding that the waivers executed by Herman C. Fleitmann on November 8, 1926, and September 27, 1929, effected in any way the statutory period for collection of 1918 taxes from Herman C. Fleitmann or his estate.

7. The Board erred in failing to hold that the waivers of November 8, 1926, and September 27, 1929, were invalid and void.

8. The Board erred in holding that "when the correspondence between the parties shows that they understood the statute to be extended there is a sufficient consent in writing."

9. The Board erred in holding that the consents in writing were complete when the petitioner signed and filed the waiver forms.

10. The Board erred in holding that the signing of a waiver comprised two elements: first, the discretionary

duty of approval which could not be delegated by an agent, and second, the ministerial duty of signing the name of the Commissioner which could be delegated by an agent.

11. The Board erred in holding that the signing of the Commissioner's name to a waiver was a ministerial act.

12. The Board erred in holding that the duty of signing the Commissioner's name to a waiver could be delegated by an agent.

13. The Board erred in holding that under their authorization Robinson and Anderson could redelegate to subordinates the duty of signing the Commissioner's name to waivers.

14. The Board erred in holding that the attempted redelegation to subordinates by Robinson and Anderson of the duty of signing the Commissioner's name to these waivers was a valid redelegation.

15. The Board erred in holding that the evidence showed that there was no attempt on the part of Robinson and Anderson to redelegate the duty of passing upon the acceptability of waivers.

16. The Board erred in holding that the evidence showed that said duty "was personally performed by Robinson and Anderson by having the waivers presented to them for decision as to their acceptability."

17. The Board erred in holding that the evidence established that "it was the practice in both Robinson's

and Anderson's offices for waivers to be brought to the attention of Robinson and Anderson and when they determined the waivers should be signed, the physical act of signing was delegated to employees."

18. The Board erred in holding with respect to these waivers that the evidence showed "in each instance a waiver was requested by the respondent and it was pursuant to these requests that the waivers were signed and sent in by the petitioner."

19. The findings of the Board with respect to the waiver dated September 27, 1929, that Anderson's name was signed at his direction by a deputy collector are not supported by the evidence.

20. The Board erred in failing to hold that there were no sufficient consents in writing which would validate the assessment and collection of this tax.

21. The Board erred in failing to hold that the waiver of February 21, 1924, was void because its execution resulted from a mutual mistake.

ARGUMENT.

I.

Assessment and collection of the deficiency are barred by the statute of limitations.

The return having been filed on March 15, 1919, the period of limitation for assessment and collection expired on March 15, 1924, unless extended by waiver. Revenue Act of 1921, §250 (d):

The first waiver, dated February 9, 1924, was signed on behalf of the Commissioner on February 13, 1924. It is conceded that this waiver is valid. This waiver extended the period of limitation to February 9, 1925.

Each of the next two waivers, the second, dated February 21, 1924, and the third, dated December 24, 1924, purported to extend the period of limitation for a period of one year after the expiration of the statutory period of limitation as extended by any waivers already on file (R. 39).

The Board of Tax Appeals held that these two waivers effected successive one-year extensions of the period of limitation, extending it to February 9, 1927, and that since this date was after the date when the deficiency was assessed, March 13, 1926, and the date when the deficiency letter was mailed, April 20, 1926, the assessment was timely and collection is not barred (R. 14-15).

We submit that the Board of Tax Appeals erred in holding that the second and third waivers effected successive one-year extensions of the period of limitation.

The effect of the second and third waivers must be determined in accordance with the intention of the parties. See *Burnet v. Chicago Railway Equipment Co.*, 282

U. S. 295, 302 (discussed on pages 51-52 of brief in Case No. 5656); *United States v. Southern Lumber Co.*, 51 F. (2d) 956, 960; *Stange v. United States*, 282 U. S. 270, 276-277. The evidence shows that the parties did not intend the second waiver to have any effect and intended that the third waiver extend the period of limitation only to February 9, 1926, one year after the expiration date of the first waiver. The first waiver was signed by both the taxpayer and the Commissioner only a few days before February 21, 1924, when the taxpayer signed the second waiver. As the period of limitation had already been extended for a year, no reason appears why the second waiver should have been signed by the taxpayer. That it was not intended by the parties to be effective is indicated by the fact that while the Commissioner's name was affixed to the first waiver promptly after the waiver was signed by the taxpayer it was not affixed to the second waiver until almost two years after that waiver was signed by the taxpayer. The third waiver was signed by the taxpayer in response to a letter dated December 20, 1924, from the Commissioner's office which was in part as follows:

"You are advised that the records of this office indicate that *a waiver* had been filed for the year 1918, extending for a year, the time within which assessments may be made. Inasmuch as the time as extended by *the waiver* for 1918 *is about to expire*, you are requested to sign the enclosed Form of Waiver for 1918, and an additional waiver for the year 1918, *in order to avoid the necessity of making an assessment* prior to the consideration of all the information submitted" (R. 46-47). (Italics ours.)

If the second waiver had been intended by the parties to extend the period of limitation beyond February 9, 1925,

the expiration date of the first waiver, the Deputy Commissioner would not, on December 20, 1924, have written that "a" waiver had been filed, or that the time as extended by "the" waiver "is about to expire," or have requested a new waiver "in order to avoid the necessity of making an assessment." Since the second waiver had not been signed on behalf of the Commissioner at the time when this letter was written, it is clear that the references in the letter to a prior waiver relate to the first waiver. The obvious purpose of the letter was to obtain a waiver extending for one year the period of limitation as extended by the first waiver. Having been signed in response to that letter, the third waiver must be construed according to the purpose shown in the letter (see *Burnet v. Chicago Railway Equipment Co.*, *supra*, p. 302) and therefore, it must be construed only as extending for one year the period of limitation as extended by the first waiver. Furthermore, at the time when the third waiver was signed by the taxpayer, the second waiver, even if the parties had intended it to be effective, was ineffective because it lacked a signature on behalf of the Commissioner (see pp. 13-20 of the brief in Case No. 5656). Thus, at that time the first waiver was the only waiver which had extended the period of limitation and was therefore the only waiver falling within the scope of the language of the third waiver which purported to extend the period of limitation "*as extended* * * * by any waivers *already* on file." (Italics ours.)

In the case of *Stern Bros. & Co. v. Burnet*, 51 F. (2d) 1042 (C. C. A., 8th Circ.), the Court was required to determine, as is the Court in this case, whether a waiver which purported to extend the period of limitation as extended "by any waivers already on file" should be construed as extending the effect of a prior waiver which was on file but had not been signed by the Commissioner

at the time the waiver in question was signed by the taxpayer. The opinion in that case shows clearly that the question is to be resolved on the basis of the intention of the parties to be inferred from the facts. There the Court found that the parties intended the second waiver to extend the effect of the first, pointing out that there was only one prior waiver on file and if any meaning were to be given to the language referring to waivers already on file it was necessary to construe the waiver in question as referring to the prior waiver. In the present case, however, meaning can be given to the corresponding language of the waiver in question, the third waiver, without construing it as referring to the second waiver, because there is another prior waiver, the first, to which the language is applicable. The evidence shows clearly that this language was intended to refer only to the first waiver and that the third waiver was intended to extend the period of limitation for only one year after the expiration date of the first waiver.

Since the third waiver extended the period for only one year after the expiration of the first waiver, the period expired on February 9, 1926, which was prior to the assessment of the deficiency and the mailing of the deficiency letter. Therefore, assessment and collection of the deficiency are barred unless protected by the two remaining waivers, the fourth, dated November 8, 1926, and the fifth, dated September 27, 1929. It is unnecessary to determine just what effect these waivers, filed after the mailing of the deficiency letter, could have upon the case if they were valid, for they were both invalid.

As is shown in the statement of the case, the circumstances under which the Commissioner's name was signed to the fourth and fifth waivers are respectively identical with the circumstances under which the Commissioner's name was signed to the third and sixth waivers involved

in Case No. 5656. We submit that the fourth and fifth waivers are therefore invalid for want of proper signature on behalf of the Commissioner. In support of this conclusion we adopt, as applicable to the fourth and fifth waivers, the reasoning in Point I of the brief in Case No. 5656.

As is shown in the statement of the case, the fourth waiver, like the third waiver involved in Case No. 5656, was filed while the Révenue Act of 1926 was in force and before that Act was amended by the Revenue Act of 1928, and was signed by the taxpayer in response to a request from the office of the Commissioner contained in a letter in which it was represented that the period of limitation had not yet expired. Further, as we have shown above, the period of limitation had expired before February 26, 1926, the date of the enactment of the Revenue Act of 1926. Therefore, this waiver, like the third waiver involved in Case No. 5656, was invalid (1) because it was not authorized by section 278 of the Revenue Act of 1926, (2) because it was executed by reason of a mutual mistake or fraud, and (3) because the liability for the deficiency had been extinguished by section 1106 (a) of the Revenue Act of 1926. In support of this conclusion we adopt, as applicable to the fourth waiver, the reasoning in subdivision (c) of Point III of the brief in Case No. 5656.

As is shown in the statement of the case, the fifth waiver, like the sixth waiver involved in Case No. 5656, was filed on September 27, 1929, while the Revenue Act of 1926 as amended by the Revenue Act of 1928 was in force, and since, as we have shown above, the period of limitation had expired before it was signed, this waiver was, like the sixth waiver in Case No. 5656, invalid under section 278 (d) of the Revenue Act of 1926, as amended (see pp. 48-50 of brief in Case No. 5656).

The period of limitation having expired before the assessment of the deficiency and the mailing of the deficiency letter, and the waivers filed subsequently being invalid, we submit that assessment and collection of the deficiency are barred.

II.

The consent in writing required for the validity of the fourth waiver was not contained in the letter requesting this waiver.

As is shown in the statement of the case, the facts relating to this point are substantially the same as the facts relating to the corresponding point, Point II, in the brief in Case No. 5656. In support of this point we adopt, as applicable to the fourth waiver, the reasoning in Point II of the brief in Case No. 5656.

III.

The petitioners are not estopped to deny the validity of the fourth and fifth waivers.

Anticipating that the respondent will make, with respect to all three cases before the Court, a general argument to the effect that the petitioners are estopped to deny the validity of any waivers, we point out that even if this argument has any validity in the other cases it is not applicable to this case. The basis of the argument is the fact that the taxpayer secured further consideration of his tax liability by filing the waivers in question. That fact is not present in this case because

both of the waivers which are attacked here were filed after the deficiency letter had been mailed, and, therefore, they had no effect upon the consideration of the tax liability.

CONCLUSION.

It is respectfully submitted that the order and determination of the Board of Tax Appeals in this case should be reversed.

Respectfully submitted,

RICHARD E. DWIGHT,
Attorney for the Petitioners.

RICHARD E. DWIGHT,
HOWE P. COCHRAN,
FREDERICK S. WINSTON,
WILLIAM N. WOOD,
HAROLD L. SMITH,
CURTISS E. FRANK,
Of Counsel.

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1932

No. 5656

FREDERICK T. FLEITMANN, APPELLANT,

vs.

**DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.**

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED APRIL 13, 1932.

PRINTED JUNE 14, 1932.

Court of Appeals of the District of Columbia

APRIL TERM, 1932

No. 5656

FREDERICK T. FLEITMANN, APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

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Court of Appeals of the District of Columbia

No. 5656.

FREDERICK T. FLEITMANN, Appellant,

vs.

DAVID BURNET, Commissioner of Internal Revenue.

1

Docket No. 28450.

FREDERICK T. FLEITMANN

vs.

COMMISSIONER OF INT. REV.

For Taxpayer: Harry Friedman (Withdrawn), F. S. Winston, Esq., Richard E. Dwight, Esq., W. N. Wood, Esq., Howe P. Cochran, Esq.

For Commissioner: Bruce A. Low, Esq., E. Meacham, Esq., M. B. Leming, Esq., L. H. Rushbrook, Esq.

Docket Entries.

1927.

May 13. Petition received and filed. Taxpayer notified.

“ 14. Copy of petition served on General Counsel.

July 6. Motion for extension of time to 10-11-27 to answer, filed by G. C.

“ 7. Granted. Both sides notified.

Sep. 23. Answer filed by G. C.

Oct. 4. Copy of answer served on taxpayer. General calendar.

1929.

Apr. 4. Hearing date set May 21, 1929.

“ 9. Motion to place on the Reserve Cal. filed by G. C. 4-11-29 Granted.

Nov. 13. Hearing set Jan. 15, 1930.

1929.

Dec. 19. Motion for leave to file amended petition, amendment tendered, filed by taxpayer.

“ 20. Motion to limit hearing as to whether the assessment is barred by the statute of limitations, filed by taxpayer. 12-31-29 Granted.

“ 20. Motion to amend petition granted.

“ 27. Copy of motion and amended petition served on G. C.

1930.

Jan. 7. Notice of appearance of W. N. Wood as counsel for taxpayer filed.

“ 9. Motion to place on the Reserve Cal. filed by G. C. 1-10-30 Granted.

“ 15. Answer to amended petition filed by G. C. Copy served 1-16-30.

July 16. Motion to place on Day Calendar filed by taxpayer.

“ 17. Motion granted for hearing Oct. 2, 1930.

Sep. 24. Notice of the appearance of Harry Friedman, counsel for taxpayer filed.

“ 24. Motion for continuance to 10-8-30 filed by taxpayer. 9-26-30 Granted to 10-8-30.

“ 24. Motion for leave to file amended answer in lieu of answer filed 1-15-30 filed by G. C. Amended answer tendered. 9-26-30 Granted.

“ 26. Application for subpoena filed by taxpayer. 9-29-30 Subpoena issued. 10-3-30 Subpoena served.

Oct. 3. Application for subpoena filed by G. C. (F. T. Fleitmann). 10-3-30 Subpoena issued.

“ 8. Hearing had before Mr. Arundell. Continued to Oct. 27, 1930.

“ 8. Order of continuance to 10-27-30.

“ 11. Transcript of hearing of Oct. 8, 1930 filed.

“ 24. Deposition of Chas. W. Anderson filed. (2)

“ 24. Deposition of John S. Shea filed. (2)

“ 27. Copy of depositions served on G. C.

“ 27 & 28. Hearing had before Mr. Arundell. Submitted. Consolidated with dkt. 17121. Briefs due Dec. 22, 1930—reply due Jan. 22, 1931.

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1930.

- Nov. 3. Transcript of hearing Oct. 27 and 28, 1930 filed.
Dec. 19. Motion for extension to Jan. 5, 1931 to file brief
and 30 days for reply brief filed by G. C. and
granted.

1931.

- Jan. 3. Brief filed by G. C. Served.
" 5. " " " taxpayer. 1-5-31 Copy served on
G. C.
" 28. Reply brief filed by G. C.
" 30. Notice of withdrawal of Harry Friedman as
counsel for taxpayer filed.
" 30. Motion for extension of two weeks to file reply
brief filed by taxpayer. 1-31-31 Granted.
Feb. 18. Reply brief filed by taxpayer. Copy served on
G. C. 2-19-31.
Apr. 20. Findings of fact and opinion rendered, C.
Rogers Arundell, Div. 7. The proceeding
will be restored to the general calendar for
hearing on the merits.
" 23. Hearing set May 28, 1931.
May 28. Hearing had before Mr. Murdock. Stipulation
as to deficiency filed.
June 3. Decision entered, John E. Murdock, Div. 3.
Nov. 27. Stipulation for review by Court of Appeals of
D. C. filed.
" 27. Petition for review to Ct. of Ap. of D. C. with
assignments of error filed by taxpayer.
" 27. Proof of service filed.
Dec. 29. Statement of evidence lodged.
" 29. Notice of lodgment of statement and of hearing
on Jan. 13, 1932 filed.

1932.

- Jan. 12. Objections to statement of evidence filed by
G. C.
" 13. Hearing had before Mr. Arundell on approval
of statement of evidence. Continued to Feb.
17, 1932 to enable parties to prepare new
statement of evidence.
" 13. Order of continuance to 2-17-32 for hearing on
approval of statement of evidence entered.

1932.

- Jan. 18. Motion for extension of 60 days to prepare and transmit record filed by taxpayer.
- “ 19. Order enlarging time to March 26, 1932 for preparation of evidence and delivery of record entered.
- Feb. 10. Motion for continuance until after 3-1-32 for hearing on approval of statement of evidence filed by taxpayer.
- “ 12. Order of continuance to March 2, 1932 entered.
- Mar. 2. Hearing had before Mr. Arundell on approval of statement of evidence. Parties to submit agreed statement.
- “ 16. Motion for extension to 4-15-32 to prepare and transmit record filed by taxpayer.
- “ 17. Order enlarging time to April 15, 1932 for preparation of evidence and delivery of record entered.
- “ 23. Agreed statement of evidence lodged.
- “ 25. Agreed statement of evidence approved and ordered filed.
- “ 29. *Præcipe* filed, proof of service thereon. (Agreed.)

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Filed Dec. 20, 1929.

United States Board of Tax Appeals.

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amended Petition.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in the deficiency letter (IT:CR:G-9 CCB) dated March 14, 1927, and, as the basis for his appeal, sets forth the following:

(1) The taxpayer is an individual with his office at 356 Fourth Avenue, New York, N. Y.

(2) The deficiency letter, a copy of which is attached, (Exhibit A) was mailed to the taxpayer on March 14, 1927, and showed a deficiency as follows:

Tax unpaid for the calendar year 1918 through abatement claim filed	\$42,702.50
Overassessment determined	482.78
Deficiency in payment	\$42,219.72

(3) The taxes in controversy are income and surtaxes for the calendar year 1918, unpaid in the amount of \$42,219.72.

(4) The determination of tax contained in the said deficiency letter is based upon the following errors:

(a) Failure of the Commissioner to hold that the proposed deficiency for the year 1918 is barred from collection.

(b) The Commissioner in determining the amount of non-taxable dividends received by the taxpayer from Fleitmann & Co., Inc. has erroneously concluded that the
4 income of the Corporation available for dividends, be not reduced by the provisions of the agreement of the incorporators of Fleitmann & Co., Inc. setting aside \$100,000 annually out of earnings, after the payment of preferred dividends at the rate of 6% per annum and common dividends at the rate of 7% per annum, as a fund to purchase or retire the preferred stock of the Corporation.

(c) The Commissioner has erroneously used the average consolidated income of Fleitmann & Co., Inc. and Fairmont Manufacturing Company for the period May 24, 1918 to December 31, 1918 as a basis of determining the income available for dividends paid by Fleitmann & Co., Inc.

(d) The Commissioner has understated the amount of non-taxable dividends assigned to the taxpayer as his proportion of the common dividend paid July 3, 1918 from paid-in surplus of Fleitmann & Co., Inc.

(e) The Commissioner has erroneously used the average shareholdings of the taxpayer for the period May 24, 1918 to December 31, 1918 as a basis of determining the amount of common dividends received by the taxpayer July 3, 1918 from paid-in surplus of Fleitmann & Co., Inc.

(f) The Commissioner has erroneously inflated the taxpayer's income and caused double taxation for 1918 by including $33\frac{1}{3}\%$ of the income of Fleitmann & Co.,

Inc. for the period January 1, 1918 to May 23, 1918	\$40,756.48
$33\frac{1}{3}\%$ of the dividends received by Fleitmann & Co. Inc. for the period January 1, 1918 to May 23, 1918	11,863.50

Total included in Block C—per Schedule 2 of the deficiency letter	\$52,619.98
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and by again including in part, the same income in block K (a) as dividends received from Fleitmann & Co. Inc. in the amount of \$47,630.00.

(g) The Commissioner has erroneously included in taxable income \$293.95 of non-taxable Liberty Bond interest as accruing to the taxpayer from an adjustment of the distributive shares of the earnings of Fleitmann & Co. Inc. for the period January 1, 1918 to May 23, 1918.

(h) The Commissioner has failed to allow the taxpayer as a deduction from gross income, a loss of \$35,000 arising from stock of the Lincrusta Works "Pallas, Inc."

5 (5) The facts upon which the taxpayer relies as a basis for his appeal are as follows:

(a) The petitioner filed his return for the year 1918 on March 13, 1919. On March 2, 1924 the Commissioner assessed an additional tax against the petitioner in the amount of \$42,702.50. Said deficiency has never been paid by the petitioner. No deficiency letter was mailed to the petitioner within five years after the filing of the return for the year 1918.

(b) Fleitmann & Co. Inc. was incorporated May 24, 1918 and took over the business of the partnership of Fleitmann & Company as of January 1, 1918, pursuant to the terms of an agreement dated April 30, 1918 and originally filed its tax return for the full calendar year 1918.

(c) The agreement between the partners, with respect to the incorporation of the Company, provided as follows:

“Fourth. The parties hereto agree that after the payment of dividends on the preferred stock and the payment of dividends at the rate of seven per cent, (7%) per annum on the common stock, or in setting aside of an amount sufficient for such dividends, the Corporation shall set aside out of its earnings in each year for a period of five years commencing with the fiscal year ending December 31st, 1918, the sum of \$100,000 as a surplus fund, and further agree that out of the reserve so created \$50,000 in each year of the third, fourth and fifth years shall be employed to purchase or retire the preferred stock of the Corporation.

“In the event that the surplus earnings in any year, after paying or providing for dividends on the preferred stock and dividends at the rate of seven percent (7%) per annum on the common stock, should be insufficient to set aside the full amount of \$100,000 the deficiency shall be made up out of such surplus earnings of the subsequent year or years of said five year period.”

(d) Fleitmann & Co. Inc. declared dividends out of the profits of the year 1918, including the profits earned between January 1 and May 23, 1918, on the assumption that the entire profits of the year 1918 represented earned surplus and the stockholders reported such dividends as taxable income and paid taxes thereon.

6 (e) A field examination disclosed that Fleitmann & Co. Inc. was prevented from filing a return for the whole year by Section 330 of the Revenue Act of 1918, because its net income was less than 20% of its invested capital.

(f) Fleitmann & Co. Inc., on or about October 27, 1923, filed an amended return for the period May 24, 1918 to December 31, 1918, pursuant to the field examination at the same time exercising its right to consolidate with the Fairmont Manufacturing Company, by virtue of its ownership and control of over 97% of the outstanding voting stock of that Company, and as no new books had been opened for the Corporation, the balance as of May 31, 1918 were adjusted to the date of incorporation, May 24, 1918, for the purpose of the amended return. The following

statement illustrates the manner in which the incorporation agreement was carried out, viz:

Assets acquired from the partnership:

Cash, Foreign Balances, Accounts and Notes Receivable....	\$3,497,684.29
Investments—at cost to partnership.....	899,228.85
Advances, etc. less \$20,700 credited on indebtedness of estate	560,519.00
Deferred charges, etc.	23,629.18
Installation and Furniture & Fixtures.....	34,657.11
Total acquired of partnership.....	<u>\$5,015,718.43</u>

Assets acquired from Estate of Hermann Fleitmann:

Shares-Union-Buffalo Mills Co.	955,000.00
	<u>\$5,970,718.43</u>

Paid for by the Corporation as follows:

4,210 shares common stock issued to F. T. Fleitmann	\$421,000.00
2,850 shares common stock issued to W. M. Fleitmann	285,000.00
6,630 shares common stock issued to H. C. Fleitmann	663,000.00
	<u>\$1,369,000.00</u>
10,000 shares preferred stock issued to Estate of Hermann Fleitmann or Executors & Trustees	1,000,000.00
Total capital stock issued.....	<u>\$2,369,000.00</u>
Notes Payable, Accounts payable & Sundry Accruals assumed	3,028,551.85
	<u>\$5,397,551.85</u>
Paid-in Surplus	<u>\$573,166.58</u>

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The Paid-in surplus represents:

Earnings from January 1, 1918 to May 23, 1918	\$161,240.48
Adjustments of values of investments to cost to partnership pursuant to Sec. 331 of the Revenue Act of 1918.....	389,679.01
Account Receivable disallowed by Federal Tax Examiner as a deduction for 1917.....	22,247.09

Paid-in surplus as above	<u>\$573,166.58</u>
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(g) Exhibit B, hereto annexed, is a statement showing income of Fleitmann & Co. Inc. available for dividends for the period May 24, 1918 to December 31, 1918, and also shows that the common dividends paid July 3, 1918 and December 23, 1918, \$104,342.70 is apportioned as paid from the paid-in surplus of the corporation.

(h) The taxpayer's share of said dividends apportioned as received during 1918 from paid-in surplus of Fleitmann & Co. Inc. is \$28,321.19, arrived at as follows:

2% Common Dividend paid July 3, 1918 on 4,210 shares, (all from paid-in surplus)	\$8,420.00
7% Common Dividend paid December 23, 1918 on 5,000 shares, \$35,000.00; and as the taxpayer's shareholdings were 27.655% of the total outstanding Common shares at December 23, 1918, his share of the dividend from paid-in surplus was	19,901.19
Total dividends received in 1918 by taxpayer from paid-in Surplus of Fleitmann & Co. Inc.	\$28,321.19

(i) The Field Examiner rendered a partnership report for the period January 1, 1918 to May 23, 1918 and reported taxable income accruing to the taxpayer of $33\frac{1}{3}\%$ of the profits of the so-called "partnership" and $33\frac{1}{3}\%$ of the dividends received by the so-called "partnership" and these profits and dividends are taxed as such in arriving at the tax now appealed, including an adjustment by the Commissioner of the Examiner's report increasing the taxpayer's distributive shares of "partnership" income \$372.64. This increase represents \$293.95 non-taxable Liberty Bond Interest and \$78.69 Mutual Insurance Dividends, the latter item being a credit to expense.

(j) The partnership of Fleitmann & Company terminated its existence December 31, 1917, pursuant to the
8 terms of an agreement dated April 30, 1918 and the taxpayer's interest in the Corporation was only 30.75% and decreased to 27.47% during the year 1918.

(k) The deduction of \$35,000.00 claimed as a loss on stock, arose from the fact that the Lincrusta Works "Pallas Inc." was adjudicated a bankrupt on August 9, 1917.

(l) All efforts of reorganization failed and its asset- were sold on January 9, 1918 and the final dividend paid from the proceeds of the sale amounted to 18% of the outstanding creditors' claims and was paid on April 30, 1918.

(m) An audit of the taxpayer's return disclosed that this loss had not been claimed by him in his original return and,

therefore, was allowed by the Department, Reference IT:PA:2. LLC-202-C and Certificate of Overassessment (a copy of which is attached marked Exhibit C) #212118 dated June 26, 1922 for \$12,014.89 was issued and paid.

(6) Wherefore the petitioner prays that this Board may hear the proceeding and decide:

(a) The proposed deficiency for the year 1918 in the amount of \$42,219.72 is barred from collection. (Russell v. United States, 278 U. S., 181.)

(b) The amount of income available for dividends in respect of Fleitmann & Co. Inc. and not of the consolidated income of Fleitmann & Co. Inc. and the Fairmont Manufacturing Company, should be calculated with consideration of the provisions of the incorporators' agreement of April 30, 1918, setting aside earnings of \$100,000 annually for the retirement of preferred stock of Fleitmann & Co. Inc.

(c) Dividends received from Fleitmann & Co. Inc. in excess of earnings available for dividends and/or paid from paid-in surplus, should be excluded from the taxpayer's taxable income as a return of capital and be calculated with respect to shareholdings at time of dividend payments.

(d) No part of the income of Fleitmann & Co. Inc. for the period January 1, 1918 to May 23, 1918 should be taxed to the taxpayer as partnership income and again taxed as dividends received from Fleitmann & Co. Inc.

(e) No part of the Liberty Bond interest included in the adjustment of income of Fleitmann & Co. Inc. for the
9 period January 1, 1918 to May 23, 1918 should be included in taxable income of the taxpayer.

(f) In arriving at taxable income, a deduction of \$35,000 should be allowed the taxpayer for his loss on stock in Pallas Inc.

(Signed)

RICHARD E. WRIGHT,
Counsel for Taxpayer,
100 Broadway, New York, New York.

STATE OF NEW YORK,

County of New York, ss:

H. C. Neumann, being duly sworn, deposes and says, that he is attorney in fact for Frederick T. Fleitmann, the tax-

payer above named and as such is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true except such facts as are stated to be upon information and belief and as to those facts he believes them to be true; that the reason this verification is made by deponent instead of by the taxpayer Frederick T. Fleitmann is because said taxpayer is not within this country and deponent is authorized to act for him.

(Signed)

H. C. NEUMANN.

Subscribed and sworn to before me this 16th day of December, 1929.

(Signed)

HARRY LANGFORD,

[SEAL.]

Notary Public.

(Stamped:) Harry Langford, Notary Public, Nassau County. Certificate filed in New York Co. Co. Clerk's No. 611, Reg. No. 11,413. Commission expires March 30, 1931.

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EXHIBIT A.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT: CR: G-9. CCB.

March 14, 1917.

Frederick T. Fleitmann,
356 Fourth Avenue,
New York, New York.

SIR:

Your claim for the abatement of a deficiency in tax amounting to \$42,702.50 filed March 2, 1924, assessed against you for the taxable year 1918, has been carefully considered by this office and it is proposed to allow the said claim for \$482.78 and reject it for \$42,219.72, as computed upon the enclosed statement and schedule.

In accordance with the provisions of Section 283 (e) or Section 283 (k) of the Revenue Act of 1926 you are allowed

sixty days (not counting Sunday as the sixtieth day) from the date of mailing of this letter within which to file a petition with the United States Board of Tax Appeals, Earle Building, Washington, D. C. contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file such petition you are requested to execute waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:CR:G-9-CCB. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner,

By C. R. NASH,
Assistant to the Commissioner.

Enclosures: Statement, Waiver—Form A.

11 *Statement of Returns Examined and Resulting Tax Liability.*

Returns Examined.

Individual.	Year.	Form.	Date filed.
Frederick T. Fleitmann	1918	1040	March 13, 1919

Tax Liability.

Individual.	Year.	Overassessment.
Frederick T. Fleitmann	1918	\$482.78

Full details of the adjustments producing the above-stated results are contained in the attached schedules 1 to 3, inclusive.

Consideration has been given to the statements contained in the various briefs recently submitted and to conclusions reached in conference of December 13, 1924, held jointly on the tax liability of the corporation of Fleitmann and Company for the period May 24, 1918 to December 31, 1918 and later years, and on the individual tax liability of the part-

ners of Fleitmann & Company for the calendar years 1918 to 1921 inclusive, growing out of the receipt by them of dividends paid in part from earnings of the partnership for the period January 1, 1918 to May 23, 1918.

It has been held that income available for the payment of dividends for the period May 24, 1918 to December 31, 1918, be not reduced by the provisions of the voting trust agreement of May 22, 1918 setting aside \$100,000 annually for the retirement of preferred stock. Following this recommendation, the income available for dividends has not been reduced by this sum and has been computed in accordance with the usual method used by the Bureau on the income for the period, as a whole, and not by the method used in Schedule N submitted with the amended corporation return for 1918.

12 The income available for the payment of dividends in 1918 and later years as thus computed, has, when exceeded by dividends actually paid, been used as the basis of determining the amount paid from the partnership earnings or paid-in surplus at May 24, 1918. Your taxable income has been reduced only by dividends on the common stock of Fleitmann and Company held by you.

Waiver which will expire December 31, 1927 is on file for the years 1918, 1919, 1920 and 1921.

A carbon of this letter has been mailed to Patterson, Teele and Dennis in accordance with the authorization contained in your power of attorney dated April 1, 1924, running to them which is on file in this office.

In determining your tax liability as stated herein your claims for the abatement of \$42,702.50 and refund of \$8,550.16, respectively, in 1918, have been carefully considered.

The audit is based upon Revenue Agent's report dated August 4, 1923.

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Form A.

Frederick T. Fleitmann, 356 Fourth Ave., New York,
New York.

*Waiver of Right to File a Petition with the U. S. Board of
Tax Appeals.*

The undersigned taxpayer hereby waives the right to file a petition with the U. S. Board of Tax Appeals under Sec-

tion 274 (a) of the Revenue Act of 1926 and consents to the collection of a deficiency in tax for the year 1918, aggregating \$42,219.72.

Tax Assessed:

Original	\$15,910.56
Additional against which a claim for abatement.....	
was filed	42,702.50
	\$58,613.06
Less: Amount previously allowed.....	12,014.89
	46,598.17
Correct tax liability.....	46,115.39
Amount of overassessment.....	482.78
Unpaid through abatement claim filed.....	42,702.50
Deficiency in payment.....	\$42,219.72

[SEAL.]

(Name:) — — —,

(Address:) — — —,

By — — —.

Date: — — —, — — —.

NOTE.—This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 1106 of the Revenue Act of 1926.

14 Frederick T. Fleitmann, Year ended December 31, 1918.

SCHEDULE 1.

Net Income.

Net income as disclosed by Bureau Letter dated February 7, 1924 and supported by Bureau letter dated April 8, 1926.....	\$130,919.11
As corrected	130,164.90
Deduction: Dividends not taxable.....	\$754.21

SCHEDULE 2.

Block.	Revenue agent's report August 4, 1923.	Deduction.	Corrected.
B	\$18,190.00		\$18,190.00
C	43,507.73	\$754.21	42,753.52
F	207.00		207.00
G	4,402.22		4,402.22
H	66,306.95	754.21	65,552.74
I	3,853.89	.....	3,853.89
J	62,453.06	754.21	61,698.85
K (a)	68,466.05		68,466.05
L	\$130,919.11	\$754.21	\$130,164.90

The above deduction is computed as follows:

Computation of earnings available for the payment of dividends under article 858, Regulations 45:

Net consolidated taxable income per Schedule
1 of assessment letter to the corporation... \$211,070.19

Add:

Nontaxable interest	\$1,402.84	
Nontaxable dividends received	164,754.00	
		166,156.84
		377,227.03

Deduct:

Donations	\$10,657.00	
Tentative income Tax.....	62,055.57	
		72,712.57

Earnings available for dividends May
24-December 31 \$304,514.46

Earnings 1/222 of period \$1,371.68

Earnings 40 days May 24-July 2 54,867.20

15 Forwarded \$54,867.20
Dividends paid:

Date.	Kind.	Per cent.	Amount.
July 3.	Common	51.9%	\$32,380.00
July 3.	Preferred	48.1%	30,000.00
		<u>100.0%</u>	<u>62,380.00</u>

Dividends paid out of paid-in Surplus... \$7,512.80
Percentage of dividend attributable to common
stock held by partner, \$7,512.80 x 51.9% \$3,899.14

Income Block C \$43,507.73
Add: Additional income as prorated on attached
Exhibit 372.64

\$43,880.37

Deduct: Earnings of period January 1 to May
23, 1918 returned as corporation dividends on
Common Stock here by the former partners
computed as above and on Exhibit 1,126.85

Corrected income Block C \$42,753.52

16 SCHEDULE #3.

Computation of Tax Liability.

Total net income \$130,164.90
Less:

Exemption	\$2,000.00
Dividends	68,466.05
	<u>70,466.05</u>

Income subject to Normal Tax 59,698.85
Amount taxable at 6% 4,000.00

55,698.85

Tax 6% on \$4,000.00	240.00
Tax 12% on \$55,698.85	6,683.68
	<u>6,923.68</u>

Surtax on net income as shown above 39,195.85

Total Tax 46,119.53

Less: Tax withheld at source.....	4.14
Total Tax assessable.....	\$46,115.39
Previously assessed:	
Original	\$15,910.56
Additional	42,702.50
	\$58,613.06
Less amount previously allowed...	12,014.89
	46,598.17
Overassessment allowed	
	\$482.78

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EXHIBIT A.

Distributive Shares of Corrected Income of Partnership January 1 to May 23, 1918, and Dividends Paid from Partnership Earnings May 24 to December 31, 1918.

Partners.	Corrected earnings, Jan. 1, to May 23, 1918, per amended corporation return.		Partnership earnings used in R. A. R.	Added to individual income.
	Percent.	Amount.		
H. C. Fleitmann.....	41- $\frac{2}{3}$	\$67,183.53	\$66,717.73	\$465.80
F. T. Fleitmann.....	33- $\frac{1}{3}$	53,746.83	53,374.19	372.64
W. M. Fleitmann.....	25	40,310.12	40,030.65	279.47
	100%	\$161,240.48	\$160,122.57	\$1,117.91

	Stockholdings in common stock of Fleitmann & Company.			Earnings of period January 1 to May 23, 1918, returned as corpora- tion dividends May 24 to Dec. 31, 1918.
	Average percentage over period.	May 24, 1918.	Dec. 31, 1918.	
H. C. Fleitmann...	49.4	\$663,000.00	\$913,000.00	\$1,926.18
F. T. Fleitmann...	28.9	421,000.00	500,000.00	1,126.85
W. M. Fleitmann...	21.7	285,000.00	407,000.00	846.11
	100%	\$1,369,000.00	\$1,820,000.00	\$3,899.14

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EXHIBIT C.

Jun. 27, 1922.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

Jun. 26, 1922.

Income Tax Unit.

IT:PA:2. LLC-202-C.

Certificate of overassessment Number: 212,118.

Allowed: \$12,014.89.

Rejected: \$——.

Mr. Frederick T. Fleitmann,
150 West 59th St.,
New York, N. Y.

SIR:

An audit of your income tax return for 1918, Form 1040 and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

A reaudit of your 1918 return discloses that the loss of \$35,000.00 on sale of stock was not claimed by you. An examination of this loss has been made and from information furnished it has been decided that this is an allowable deduction and should have been claimed on your 1918 return. Therefore, this amount has been allowed as a deduction against your income for that year.

There is added to your income \$4.14, representing tax paid by the debtor corporation and interest from bonds containing a tax-free covenant clause, since the amount paid the obliger, pursuant to a tax-free covenant clause contained in the bond is in the nature of additional interest. However, \$4.14 tax paid by debtor corporation has been allowed as a credit against the assessment.

See page 2 attached for computation.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the Collector of Internal Revenue for your district.

2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any on income returns of years other than than on which the
19 overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

Respectfully,

(S.)

E. H. BATSON,
Deputy Commissioner,
By B. S. KIMBELL.

Instructions Executed.

Schedule Number: 241.

District: 2nd N. Y.

May 26, 1922.

Amount abated: \$——.

Amount credited: \$——.

Year: ——.

Account Number: ——.

Stamp here: ——.

Amount refunded: \$12,014.89.

(S.) Signature: FRANK K. BOWERS,
Collector Int. Rev.

Previously assessed	\$15,910.56
Correct assessment	3,895.67
Over assessment	\$12,014.89

(Here follows Exhibit B, side folios 20 and 21.)

22 Filed U. S. Board of Tax Appeals Sept. 26, 1930.

United States Board of Tax Appeals.

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amended Answer to Amended Petition.

The respondent, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for amended answer to amended petition, in lieu and in substitution of the answer filed January 15, 1930, to petitioner's amended petition filed December 19, 1929, admits and denies as follows:

1. Admits the statements and allegations contained in introductory paragraph and paragraph No. 1 of the amended petition heretofore referred to.

2. Admits the allegations contained in paragraph No. 2 of the amended petition heretofore referred to.

Fleitmann & Co., Inc.

Income Available for Dividends May 24—December 31, 1918.

1918.	Deductions						Income.		
	Common dividends paid out of special paid-in surplus.	Restricted earnings.	Accrued common dividend less paid out of income.	Preferred dividends paid out of income.	Estimated Federal tax accrued.	Total for month.	Total for month.	Operating.	Dividends.
Income May 24-31.....						6,712.39	6,712.39	6,712.39	
Deductions May 24-31.....			2,129.55		451.73	2,581.28			
Income available May 31.....						4,131.11			
Income—Month of June.....						53,884.86	53,884.86	13,922.36	39,962.50
Deductions—Month of June...			9,298.33		1,693.96	10,992.29			
Income available June 30.....						47,023.68			
Income July 1-3.....						1,392.24		1,392.24	
Deductions July 1-3.....			629.60	30,000.00	169.40	30,799.00			
Income available July 3.....						17,616.92			
Common dividend paid July 3. 32,380.00									
Income July 4-31.....						12,530.12	13,922.36	12,530.12	
Deductions July 4-31.....			8,814.40		1,524.56	41,137.96			
Income available July 31.....						19,808.08			
Income—Month of August.....						13,922.36	13,922.36	13,922.36	
Deductions—Month of August..			9,444.16		1,693.96	11,138.12			
Income available August 31....						22,592.32			
Income—Month of September..						13,922.36	13,922.36	13,922.36	
Deductions—Month of Septem- ber			9,444.16		1,693.96	11,138.12			
Income available Sept. 30.....						25,376.56			
Income September 30-October 1.						2,418.08		464.08	1,954.00
Deductions Sept. 30-Oct. 1.....			314.80	15,000.00	56.46	15,371.26			
Common dividend paid Oct. 1..			16,190.00*						
Income available October 1....						12,423.38			

Income available Sept. 30.....							25,376.56			
Income September 30–October 1.....							2,418.08		464.08	1,954.00
							27,794.64			
Deductions Sept. 30–Oct. 1.....			314.80	15,000.00	56.46		15,371.26			
Common dividend paid Oct. 1.....			16,190.00*							
Income available October 1.....							12,423.38			
Income October 2–October 31.....							13,458.28	15,876.36	13,458.28	
							25,881.66			
Amounts forward.....	32,380.00		23,885.00	45,000.00	7,284.03	76,987.77	25,881.66	118,240.69	76,324.19	41,916.50
21										
Amounts brought forward.....	32,380.00		23,885.00	45,000.00	7,284.03	76,987.77	25,881.66	118,240.69	76,324.19	41,916.50
Deductions Oct. 2–Oct. 31.....			9,478.79		1,637.50	26,487.55	11,116.29			
Income available Oct. 31.....							14,765.37			
Income—Month of November.....							48,047.36	48,047.36	13,922.36	34,125.00
							62,812.73			
Deductions—Month of November.....			10,616.65		1,693.96	12,310.61	12,310.61			
Income available November 30.....							50,502.12			
Income Dec. 1–Dec. 23.....							113,243.78		10,673.78	102,570.00
							163,745.90			
Deductions Dec. 1–Dec. 23.....			7,785.36		1,298.70		9,084.06			
			51,765.80				154,661.84			
Common Dividend paid Dec. 23, \$126,560.00.....	74,794.20		51,765.80*							
Income Dec. 24–Dec. 31.....							4,211.04	117,454.82	3,248.54	962.50
							158,872.88			
Deductions Dec. 24–Dec. 31.....		100,000.00	2,831.50		395.26	109,479.32	100,395.26			
	2,831.50*		2,831.50*				58,477.62			
	104,342.70	100,000.00		45,000.00	12,309.45	225,265.25		283,742.87	104,168.87	179,574.00
Minor adjustments of earnings.....							236.07	236.07	236.07	
							58,241.55	283,506.80	103,932.80	179,574.00
Income Jan. 1, 1918 to May 23, (Special Paid in Surplus).....	161,240.48*									
Preferred Dividend declared Dec. 23, 1918 Paid Jan. 2, 1919.....							15,000.00			
	56,897.78						43,241.55			

NOTE.—After payment of Preferred Dividend and dividends totalling 7% on the Common Stock, \$100,000.00 in accordance with terms of incorporation agreement must be set aside as a special surplus to retire Preferred Stock before any further dividends may be paid out of current earnings.

[*Red in copy.]

3. Admits the allegations contained in paragraph No. 3 of the amended petition heretofore referred to.

4. Denies that the respondent erred in determining or computing petitioner's tax liability for the calendar year 1918, as alleged in corresponding paragraph of the amended petition heretofore referred to.

5. The respondent admits, denies and avers with reference to the allegations contained in paragraph No. 5 of the amended petition heretofore referred to as follows:

23 (a) Admits that petitioner filed his return for the year 1918 on March 13, 1919, and that on March 2, 1924, the respondent assessed an additional tax against the petitioner in the amount of \$42,702.50, but denies the remaining allegations contained in corresponding subparagraph of the amended petition heretofore referred to.

(b) to (m), inclusive. Denies all allegations contained in corresponding subparagraphs of the amended petition heretofore referred to.

(n) The respondent admits, as petitioner avers, that his income tax return for 1918 was filed on March 13, 1919, and that the deficiency letter was mailed to the petitioner on March 14, 1927. The respondent further avers that the petitioner and the respondent have in writing entered into five valid and binding waivers for 1918, which were accepted by the respondent and which extended the period for making assessment and collection of petitioner's income tax for 1918 to a period beyond March 14, 1927, as more particularly shown by photostatic copies of such waivers, which are hereto attached and made a part hereof and are numbered in their chronological order as Exhibits 1 to 5, respectively.

6. Denies generally and specifically each and every allegation not hereinbefore admitted or qualified.

Wherefore it is prayed that the relief sought by the petitioner is denied.

(Signed)

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

BRUCE A. LOW,
Special Attorney,
Bureau of Internal Revenue.

24 NOTE.—Exhibits 1 to 5, referred to herein are identical with respondent's Exhibits A, B, C, D and E, respectively, which are attached to the statement of evidence. Exhibits 1 to 5 are therefore omitted here.

25 Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated April 20, 1931.

Waivers executed by petitioner, to which the Commissioner's name was affixed by employees in the Bureau of Internal Revenue or in the office of the Collector at the direction of persons authorized by the Commissioner to sign his name, are valid and extend the statutory period.

Richard E. Dwight, Esq., F. S. Winston, Esq., W. N. Wood, Esq., and Howe P. Cochran, Esq., for the petitioner. Bruce A. Low, Esq., for the respondent.

The respondent determined a deficiency in income tax in the amount of \$42,219.72 for the calendar year 1918. This deficiency represents the amount for which a claim for the abatement of an assessment of \$42,702.50 was rejected.

26 Upon motion of counsel for petitioner the hearing was limited in the first instance to the question of whether collection is barred by the statute of limitations.

Findings of Fact.

Petitioner's income-tax return for the calendar year 1918 was filed on March 13, 1919.

On February 7, 1924, respondent notified petitioner that he proposed to assess \$42,702.50 additional tax for 1918. In the letter of notification respondent granted the petitioner thirty days to show cause why the proposed deficiency should not be paid, and asked for a waiver of the statute of limitations. On March 5, 1924, petitioner addressed a protest to the respondent to which was attached

a waiver, dated February 18, 1924, extending the period for assessment and collection for a period of one year from the date of signing by the petitioner. This waiver does not bear the signature of respondent. On March 8, 1924, the proposed additional tax was assessed and on March 21, 1924, petitioner filed a claim for abatement of the entire assessment. In a statement attached to the claim it is stated that "an income and profits tax waiver was signed by the taxpayer and filed with the Commissioner of Internal Revenue."

By letter of February 13, 1926, the respondent requested waivers for the years 1918 to 1921. On February 18, 1926, petitioner executed a waiver extending the time for assessment of 1918 taxes to December 31, 1926, and also providing for the additional time allowed by statute in case a notice of deficiency was sent by respondent. The respondent's name was signed to the waiver by the secretary to H. B. Robinson, at Robinson's direction. Robinson was head of the Audit Review Division in the Income Tax Unit and held a written authorization from Commissioner Blair dated January 26, 1926, to sign the latter's name to waivers. Previously, under date of December 18, 1925, a communication designated I. T. U. Order No. 83 had been addressed to heads of divisions and others directing that:

Any waiver received from a taxpayer shall be referred to the Head of Division in which the case is under consideration, who will determine whether it is acceptable.

On November 5, 1926, the respondent by letter directed to the petitioner asked for further waivers covering the years 1918 to 1921. The request was acknowledged by petitioner and with his acknowledgment he enclosed a waiver dated November 18, 1926, extending the time for assessment to December 31, 1927, and providing for the additional time allowed by statute in case a notice of deficiency was sent by the respondent. Commissioner Blair's
27 name was signed to this waiver by Robinson's secretary at Robinson's direction.

In a letter dated May 3, 1926, signed by petitioner and also in a letter dated November 2, 1926, signed by petitioner's attorney, the assessment made for 1918 was protested and a conference with respect to the assessment was requested.

In letters dated December 16, 1927, November 5, 1928, and September 25, 1929, the Collector for the Third District of New York requested petitioner to execute waivers covering the assessment made for 1918. In response to the Collector's requests, waivers were executed, dated December 15, 1927, October 17, 1928, and September 27, 1929, extending the time, respectively, to December 31, 1928, December 31, 1929, and December 31, 1930, for collection of the assessment made for 1918. Petitioner's name was affixed to the waiver of October 15, 1928 by his attorney in fact, who held a power of attorney. The name of the Commissioner was typewritten in these three waivers, and the Collector's name was signed by a deputy collector at the direction of the Collector.

On August 20, 1926, Acting Commissioner C. R. Nash addressed a communication, designated A & C Mimeograph, Coll. No. 3459, to collectors, relating to collection waivers and stating "authority is hereby delegated to Collectors of Internal Revenue to sign such waivers in the name of the Commissioner * * *." The waivers referred to in that mimeograph are of the kind described in the preceding paragraph.

In a letter to the Collector for the Third District of New York, dated December 21, 1929, the Commissioner stated in part:

As Commissioner of Internal Revenue, I hereby affirm, ratify and adopt, as my own act and deed, all your prior actions in signing the name of the Commissioner of Internal Revenue to assessment and/or collection waivers under authority of A&C Mimeograph, Coll. No. 3606, R.A. No. 445, dated February 28, 1928, as amended by IT-Mimeograph, Coll. No. 3741, R.A. No. 510, dated June 1, 1929.

Respondent allowed petitioner's abatement claim for \$482.78 and rejected it for \$42,219.72 and notified petitioner of his action by letter dated March 14, 1927. From this letter petitioner appealed to the Board.

Opinion.

ARUNDELL:

Petitioner's return for 1918 was filed on March 13, 1919, and, unless the limitation period was waived, the time for

assessment and collection expired five years later or on March 13, 1924. The assessment, a part of which the respondent is now attempting to collect, was timely, having been made on March 8, 1924. We have then, the precise question of whether collection is barred.

28 The waivers filed by petitioner are as follows:

Kind.	Date of waiver.	Period of extension.
Assessment and collection	Feb. 18, 1924	To Feb. 18, 1925
Assessment	Feb. 18, 1926	To Dec. 31, 1926
do.	Nov. 18, 1926	To Dec. 31, 1927
Collection	Dec. 15, 1927	To Dec. 31, 1928
do.	Oct. 17, 1928	To Dec. 31, 1929
do.	Sept. 27, 1929	To Dec. 31, 1930

Whether the first of these waivers was invalid by reason of the lack of respondent's signature need not be decided, because the second waiver, dated February 18, 1926, was executed before the enactment of the Revenue Act of 1926 and hence it operated to extend the time under section 278 (e) of that Act. Before the second waiver expired a third one, dated November 18, 1926, was executed which, if valid, extended the period beyond the date of the deficiency notice, March 14, 1927. Petitioner's argument that waivers of the period for assessment do not waive the period for collection has been disposed of by the decisions in *Stange v. United States*, 282 U. S. —; and *Aiken v. Burnet*, 282 U. S. —.

The remaining contentions of the parties go to the validity of the waivers in view of the fact that they were not personally signed by the Commissioner of Internal Revenue. It is established that the Commissioner need not personally sign waivers in order to render them valid. *Marshall Wells Co. v. Willcuts*, 41 Fed. (2d) 751; *Pantages Theater Co.*, 17 B. T. A. 82; affd., — Fed. (2d) —; *United Thacker Coal Co. v. Commissioner*, — Fed. (2d) —; affirming on this point 15 B. T. A. 273. We do not understand that petitioner seriously questions this proposition. The evidence establishes that H. B. Robinson, head of the Audit Review Division of the Income Tax Unit, and Charles W. Anderson, Collector for the Third District of New York, were authorized by the Commissioner to sign waivers. These officials delegated to subordinates the

mechanical act of signing the Commissioner's name and petitioner challenges the validity of waivers thus signed, arguing (1) that the signing of a waiver is not a ministerial act, and (2) that, if it is, it is not the kind of ministerial act that can be delegated.

The evidence discloses that in each instance a waiver was requested by the respondent and it was pursuant to these requests that the waivers were signed and sent in by the petitioner. It has been pointed out in other cases that there is no requirement that a consent be evidenced by one piece of paper, and when the correspondence between the parties shows that they understood the statute to be extended there is a sufficient consent in writing.

29 See *Sabin v. United States*, — Ct. Cls. —; 44 Fed. (2d) 70; *Moses et al. v. United States*, 43 Fed. (2d) 653. The *Sabin* decision holds that:

The statute does not require that a consent, in order to be valid, must be in one instrument or that it shall be in any particular form. All that is required is that the consent be evidenced in writing. * * * The statute requires no more than that there shall be written evidence of the fact that both parties understand that the limitation period specified in the statute is not to govern the matter, and, therefore, that when a date to which the period has been extended is specified there shall be a complete understanding about it.

If this view be correct the consents in writing were complete when the petitioners signed and filed the waiver forms.

The nature of waivers has been discussed in several recent cases by the Supreme Court. In *Stange v. United States*, — U. S. —, it is pointed out that "a waiver is not a contract" but that it is essentially "a voluntary unilateral waiver of a defence by the taxpayer." And in *Burnet v. Chicago Railway Equipment Co.*, — U. S. —, it is said that "the Commissioner's signature was required for purely administrative purposes." See also *Florsheim Bros. Dry Goods Co. v. United States*, 280 U. S. 452, and *Aiken v. Burnet*, — U. S. —. These decisions do not hold, nor does the law require, that the Commissioner must personally affix his signature to waivers. Neither does the law require specific delegation by the Commissioner of authority to

sign his name in order to validate waivers. The revenue acts from the earliest time have imposed a multitude of duties on the Commissioner, yet it has never been supposed that the law required the incumbent of the office to personally perform them. On the contrary, it is common knowledge that a large number of employees are engaged in carrying out the duties imposed by law on the Commissioner. The statute does not provide for these employees by name or by official designation—except in a few cases such as deputy commissioners and the general counsel, nor does it describe their duties, but the need for them is recognized by Congress in making appropriations for their salaries. Cf. *Wells v. Nickles*, 104 U. S. 444, 447, holding that if any authority from Congress was necessary to enable the Secretary of the Interior to appoint certain agents, “it may fairly be inferred from appropriations made to pay for the services of these special timber agents.” See also *United States v. MacDaniel*, 7 Pet. 1, 14, 15, holding that:

To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits.

The evidence in this case establishes that it was the practice in both Robinson's and Anderson's offices for waivers to be brought to the attention of Robinson and Anderson and when they determined that the waivers should be signed, the physical act of signing was delegated to employees. While of course it is fundamental in the law of agency that an agent cannot delegate his powers, there is abundant authority to the effect that ministerial acts may be delegated and that the affixing of a signature may be such an act. The duties of Robinson and Anderson under their authorizations had a double aspect in that they were both

discretionary and ministerial. They were discretionary to the extent that it was necessary to determine whether the waivers were acceptable. Division heads had been specifically directed in I. T. U. Order No. 83 that that was a part of their duties. That duty, involving as it did the exercise of discretion, perhaps could not be delegated without specific authorization from the Commissioner. The evidence is not only that there was no attempt to delegate that duty, but that it was personally performed by Robinson and Anderson by having the waivers presented to them for decision as to acceptability. The ministerial part of Robinson's and Anderson's duties was the physical signing of the waivers. This was the only part that they delegated, and in our opinion it was a valid delegation. See *Estill County v. Embry* (C. C. A., 6th Cir.), 144 Fed. 913; *Rohrbough v. United States Express Co.*, 50 W. Va. 148; 40 S. E. 398; *Groscup v. Downey*, 105 Md. 273; 65 Atl. 930; *Worsley v. Ayres*, 144 Iowa 676; 123 N. W. 353.

Accordingly, we hold valid the waivers executed by petitioner and to which the Commissioner's name was affixed by employees in his office and in the office of the Collector under the circumstances disclosed by the evidence.

Reviewed by the Board.

The proceeding will be restored to the general calendar for hearing on the merits in due course.

TRAMMELL, dissenting:

I agree that it is not necessary that both the taxpayer and the Commissioner sign the same instrument expressing their consent to an extension of time for assessment or collection. The consent of the Commissioner, in my opinion, can be given in a letter duly signed. However,
31 there must be some written instrument signed by the Commissioner, or his duly authorized agent, accepting a waiver previously signed by the taxpayer. In the prevailing opinion no reliance is placed upon the first waiver, which was executed by the taxpayer, on February 18, 1924, but it is stated that, regardless of this waiver, the one executed by the taxpayer on February 18, 1926, and subsequent waivers, are sufficient. We must keep in mind that when facts have been disclosed which clearly show that the statute of limitations has run,

the respondent has the burden of going forward to show that the period has been extended by proper waiver. In my opinion this is not done by a showing that a waiver was executed by the taxpayer on February 18, 1926. The evidence does not disclose that it was signed by any one authorized by the Commissioner to sign it prior to the passage of the 1926 Act, even conceding that the signature of the Commissioner placed thereon in the manner indicated was a proper signature. If it was not properly signed by the Commissioner or his representative prior to the passage of the 1926 Act, the assessment was clearly barred when the 1926 Act was passed, and under section 278 (e) of that act the tax liability could not be revived by subsequent waivers and the case comes squarely within our decision in *Corn Products Refining Co.*, 22 B. T. A. 605.

The burden of proof was upon the Commissioner to show that the waiver was executed by both parties prior to the passage of the 1926 Act in order to sustain his position that the statute of limitations had not run. This he has failed to do.

In my opinion, the signatures placed on the waivers by the secretary to Mr. Robinson at his direction were unauthorized. It may well be that if the Commissioner's signature were placed on the waiver by Robinson's secretary *in his presence and at his direction*, it might be considered his own act. The evidence, however, does not disclose that this was the case.

I think it is clear that the statute contemplated that the Commissioner should sign waivers personally or that he should designate or authorize others to sign them for him, and that those so authorized by the Commissioner do not have authority to delegate that power to any one else. I think this is made clear from the language of the Supreme Court in the case of *Florsheim Bros. Dry Goods Co. v. United States*, 280 U. S. 453, where the Court, in referring to the necessity of the consent of the Commissioner in writing, said:

If a reason must be found, it exists in the general desirability of the requirement as an administrative matter. It serves to keep the Commissioner in closer touch with the matters he is charged to administer. It avoids
32 claims of improvident execution of waivers and unauthorized exactions by subordinates of the depart-

ment * * * and it provides a formal procedure which is generally desirable * * *.

In the *Stange* and *Aiken* cases, recently decided by the Supreme Court, it relied upon and quoted from the *Florsheim* case as above as authority for statements made in those cases with respect to the *requirement* of the Commissioner's signature.

If subordinates in the Department, without authority from the Commissioner, approve waivers, the very purpose of the requirement of the statute would be overthrown. The Commissioner would not be kept in close touch with the matters he is charged to administer. Improvident execution of waivers by subordinates of the Department would not be obviated. I think, therefore, that the Commissioner's name placed on the waivers by Robinson's secretary was unauthorized and did not constitute the consent of the Commissioner in writing.

I agree that the Commissioner's signature, placed on a waiver in the absence of any evidence with respect to authority of the person who put it there, might be presumed to be his authorized signature, but the evidence in this case is sufficient to overcome that presumption.

I am inclined to think that the correspondence which appears to be relied upon to some extent to sustain the validity of the waivers and which passed prior to the execution of any waiver, is not shown to be sufficient in this case. The correspondence preceding the letter of December 16, 1927, November 5, 1928, and September 25, 1929, may, in so far as the record discloses, have been written by subordinates in the Department and the very purpose of the requirement of the consent in writing of the Commissioner and the taxpayer to the waiver is to avoid improvident execution of waivers and unauthorized exactions by subordinates and to keep the Commissioner in closer touch with matters he is charged to administer. The correspondence referred to does not disclose that the Commissioner, or any one duly authorized by him, would accept or approve the waivers when executed by the taxpayer. The respondent does not recognize the waivers received pursuant to the request for waivers as being complete when received, in view of subsequent action in having them executed by Robinson's secretary, a wholly unauthorized act.

For the foregoing reasons, I find myself unable to concur in the majority opinion in this case.

Filed May 28, 1931.

United States Board of Tax Appeals.

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation of Tax Liability.

It is hereby stipulated and agreed by and between the parties to this proceeding, by and through their respective attorneys of record, that the liability of the petitioner for Federal income taxes for the taxable year 1918 is as hereinafter set forth and that the Board may enter an order of final determination in accordance herewith:

Correct tax liability.....	\$23,945.57
Taxes paid (net).....	3,895.67
Unpaid portion of tax liability.....	\$20,049.90
Taxes previously assessed (net).....	\$46,598.17
Tax liability	23,945.57
Portion of unpaid assessment to be abated	\$22,652.60

This stipulation is entered into without prejudice to the right of the petitioner to petition the Circuit Court of Appeals for a review of the Board's decision in respect of the issue pertaining to the statute of limitations.

(Signed)

H. P. COCHRAN,

Attorney for Petitioner.

(Signed)

C. M. CHAREST,

General Counsel, Bureau of Internal

Revenue, Attorney for Respondent.

34 United States Board of Tax Appeals, Washington.

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Board on May 28, 1931, it is

Ordered and decided that the liability of this petitioner for Federal income taxes for the year 1918 is as follows:

Correct tax liability.....	\$23,945.57
Taxes paid (net).....	3,895.67

Unpaid portion of tax liability.....	\$20,049.90
--------------------------------------	-------------

Taxes previously assessed (net).....	\$46,598.17
Tax liability	23,945.57

Portion of unpaid assessment to be abated	\$22,652.60
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Entered June 3, 1931.

[Seal U. S. Board of Tax Appeals.]

(Signed)

J. E. MURDOCK,

Member.

Certified Copy Sent to Each Party.

35 United States Board of Tax Appeals. Filed Nov.
27, 1931.

United States Board of Tax Appeals.

United States Board of Tax Appeals.

(Docket No. 17121.)

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

United States Board of Tax Appeals.

(Docket No. 28450.)

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

United States Board of Tax Appeals.

(Docket No. 28451.)

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

*Stipulation for Review by Court of Appeals of District of
Columbia.*

Whereas, Frederick T. Fleitmann, petitioner in Docket
#28450, is a resident and inhabitant of Switzerland and is
not an inhabitant of any circuit of the United States Circuit
Court of Appeals, and

Whereas, all three of the above-entitled actions involve questions of similar character,

Therefore it is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the decisions of the Board of Tax Appeals in
36 the three cases above named may be reviewed by the Court of Appeals of the District of Columbia.

(Signed)

HOWE P. COCHRAN,

Attorney for Petitioner.

(Signed)

C. M. CHAREST.

F.

Dated this 7th day of November, 1931.

37 United States Board of Tax Appeals. Filed Nov.
27, 1931.

Court of Appeals of the District of Columbia.

United States Board of Tax Appeals.

(Docket No. 28450.)

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition for Review of Decision of the United States Board of Tax Appeals to the Court of Appeals of the District of Columbia.

To the Honorable Judges of the Court of Appeals of the District of Columbia:

Your petitioner, Frederick T. Fleitmann, by his attorney, Richard E. Dwight, respectfully shows:

I. This is a proceeding for review by the Court of Appeals of the District of Columbia of a decision of the United States Board of Tax Appeals entered on the 3rd day of June, 1931, pursuant to Board's findings of fact and opinion promulgated on the 20th day of April, 1931, redetermining against the petitioner a deficiency in income and profits taxes for the year 1918 in the amount of \$20,049.90.

II. This appeal to the Court of Appeals of the District of Columbia is taken pursuant to a stipulation entered
38 into between the parties hereto in accordance with the terms of Paragraph (d) of Section 1002 of the Revenue Act of 1926.

III. Your petitioner duly filed his income and profits tax return for the year 1918 in the office of the Collector of Internal Revenue for the Third Collection District of the State of New York on March 13, 1919. Pursuant to said return a tax was assessed against and paid by your petitioner. After such payment the respondent asserted and proposed to collect from your petitioner an additional tax for the year 1918 whereupon your petitioner duly appealed to the United States Board of Tax Appeals and prayed for a redetermination and cancellation of his liability for further taxes for the year 1918.

IV. The point at issue presented by this appeal was whether or not the statute of limitations had run against the collection of these taxes. That issue depends in turn for its solution on the question of the validity or invalidity of certain waivers. These waivers were executed by the petitioner and the name of the Commissioner of Internal Revenue was placed thereon by stenographers and minor clerks in the office of the Bureau of Internal Revenue and by subordinates in the office of the Collector of Internal Revenue for the Third Collection District of the State of New York. The stenographers and clerks in the office of the Bureau of Internal Revenue signed the Commissioner's name to the waivers and wrote under it the initials H. B. R. H. B. R., are the initials of Henry B. Robinson, a Chief of Division in the Bureau of Internal Revenue. Mr. Robinson held a written Power of Attorney authorizing
39 him to sign the Commissioner's name to waivers.

The subordinates in the Collector's office typed the name of the Commissioner on the waivers and signed the name of the Collector under it. The Collector held a written Power of Attorney authorizing him to sign the Commissioner's name to waivers. None of the stenographers or clerks, or subordinates held authority from the Commissioner to sign his name to waivers and this practice was carried on behind the back of the Commissioner and without his knowledge or consent. Nor were such third-hand signatures of the Commissioner of Internal Revenue exe-

cuted in the immediate presence of or at the specific and particular request of Mr. Robinson or the Collector. Nor was any evidence introduced to show the date on which the name of the Commissioner was affixed to certain waivers. It was not shown therefore whether or not the signature of the Commissioner was placed on said waivers before all liability of the taxpayer was extinguished.

On April 20, 1931, the United States Board of Tax Appeals filed its findings of fact and opinion declaring the waivers to be valid and effective waivers and holding that the collection of the taxes in question was not barred by the statute of limitations and on June 3, 1931, the said Board entered a formal order stating that there was a deficiency for the year 1918 in the amount of \$20,049.90.

VI. The errors committed by the United States Board of Tax Appeals upon which your petitioner relies as the basis of this proceeding are as follows:

1. On the evidence the Board erred in entering judgment for the Commissioner.
- 40 2. On the evidence the Board erred in approving and redetermining the deficiency found by the Commissioner.
3. On the evidence the Board erred in failing to find that the collection of all further taxes from your petitioner for the year 1918 was barred by the statute of limitations.
4. The Board erred in failing to hold that under the evidence the burden of proof was on the respondent to prove that the statutory period of limitations had been extended by valid waivers.
5. The Board erred in failing to hold that there were no sufficient consents in writing which would validate the collection of this tax.
6. On the evidence the Board erred in failing to find that the waivers relied upon by the Government were invalid and void.
7. On the evidence the Board erred in failing to hold that the waivers relied upon by the Government were invalid and void for the reason that they were never signed by the Commissioner or anyone authorized to sign in his stead.
8. The Board erred in failing to hold that all the waivers in this case were invalid and void for the reason that there is nothing in the evidence to show that any of them were

signed by or for the Commissioner prior to the dates on which on their face they expired.

9. The Board erred in holding that "when the correspondence between the parties shows that they understood the statute to be extended there is a sufficient consent in writing."

10. The Board erred in holding that the consents in writing were complete when the petitioner signed and filed the waiver forms.

41 11. The Board erred in failing to hold that the waiver signed February 18, 1924 was without effect since it was unsigned by the Commissioner.

12. The Board erred in failing to hold that the collection of the tax was barred on June 2, 1924, the date of enactment of the Revenue Act of 1924, and that accordingly collection of said tax was barred forever under Section 278 (e) of the Revenue Act of 1924.

13. The Board erred in failing to hold that the waiver executed by the petitioner on February 18, 1926 was invalid and void for the reason that there was nothing in the evidence to show that it was signed by the Commissioner or some one authorized to sign in his stead at a date prior to the passage of the Revenue Act of 1926.

14. The Board erred in failing to hold that the waiver of February 18, 1926 was invalid and void for the reason that it was obtained by misrepresentation and fraud, and executed under mutual mistake in that the letter requesting it recited that the statute of limitations was about to run, whereas as a matter of fact the collection of the tax was at the time in question barred by the statute of limitations.

15. The Board erred in failing to hold that the collection of the tax was barred on and/or after February 26, 1926, the date of the enactment of the Revenue Act of 1926, and that accordingly collection of said tax was barred forever under Section 1106 (d) of that Act.

16. The Board erred in holding that the signing of a waiver comprised two elements: first, the discretionary duty of approval which could not be delegated by an
42 agent, and, second, the ministerial duty of signing the name of the Commissioner which could be delegated by an agent.

17. The Board erred in holding that the signing of the Commissioner's name to a waiver was a ministerial act.

18. The Board erred in holding that the duty of signing the Commissioner's name to a waiver could be delegated by an agent.

19. The Board erred in holding that under their authorization Robinson and Anderson could redelegate to subordinates the duty of signing the Commissioner's name to waivers.

20. The Board erred in holding that the attempted re-delegation to subordinates by Robinson and Anderson of the duty of signing the Commissioner's name to these waivers was a valid redelegation.

21. The Board erred in holding that the evidence showed that there was no attempt on the part of Robinson and Anderson to redelegate the duty of passing upon the acceptability of waivers.

22. The Board erred in holding that the evidence showed that said duty "was personally performed by Robinson and Anderson by having the waivers presented to them for decision as to their acceptability."

23. The Board erred in holding that the evidence established that "it was the practice in both Robinson's and Anderson's offices for waivers to be brought to the attention of Robinson and Anderson and when they determined the waivers should be signed, the physical act of signing was delegated to employees."

24. The Board erred in holding with respect to these waivers that the evidence showed "in each instance a waiver was requested by the respondent and it was pursuant to these requests that the waivers were signed
43 and sent in by the petitioner."

25. The Board erred in refusing to exclude all other witnesses from the Court while one was testifying.

26. The findings of the Board that the waivers in question were furnished in response to letters from the respondent requesting same are not supported by the evidence.

27. The findings of the Board with respect to the waiver dated September 27, 1929 that "the Collector's name was signed by a deputy collector at the direction of the Collector", are not supported by the evidence.

Wherefore your petitioner prays that the Court may review the action and decision of the Board of Tax Appeals in this cause, reverse the decision of said United States Board of Tax Appeals and direct the entry of a decision by

said Board in favor of your petitioner determining that there is no deficiency in income and profits taxes for the year 1918 and that no further taxes should be assessed or collected, and awarding to your petitioner such other and further relief as to the Court may seem just and proper.

RICHARD E. DWIGHT,

RICHARD E. DWIGHT,

Attorney for Petitioner,

100 Broadway, New York City, N. Y.

44 STATE OF NEW YORK.

City of New York,

County of —, ss:

Richard E. Dwight, being first duly sworn, says that he is counsel of record in the above-named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

RICHARD E. DWIGHT.

Subscribed and sworn to before me this 24th day of November, 1931.

CHARLES J. McNALLY,

Notary Public.

Notary Public, Kings County.

Kings Co. Cl'k's No. 106, Reg. No. 2124. N. Y. Co. Cl'k's No. 340, Reg. No. 2Mc205.

Commission expires March 30, 1932.

My commission expires — —, —.

45 United States Board of Tax Appeals.

Received Mar. 23, 1932. U. S. Board of Tax Appeals.

United States Board of Tax Appeals. Lodged Mar. 23, 1932.

Filed March 25, 1932.

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Statement of Evidence.

At the hearings of the above-entitled cause on October 8th, 27th and 28th, 1930, before the Honorable C. Rogers Arundell, Member of the United States Board of Tax Appeals, the following evidence was offered and received:

Appearances:

Harry Friedman, Esq., and William N. Wood, Esq., of Washington, and Richard E. Dwight, Esq., of New York City, N. Y., on behalf of the petitioner.

Mason D. Leming, Esq., Bruce A. Low, Esq., and L. H. Rushbrook, Esq., (C. M. Charest, Esq., General Counsel of the Bureau of Internal Revenue), on behalf of the Commissioner of Internal Revenue, respondent.

A stipulation was entered into between the parties agreeing to the following facts:

The 1918 return of Frederick T. Fleitmann, was
46 filed on March 13, 1919. On March 8, 1924, the Commissioner of Internal Revenue assessed an additional tax against him for 1918 of \$42,702.50, which amount has not been collected. The deficiency letter for the year 1918 was mailed on March 14, 1927. Petitioner rested.

Respondent offered in evidence an assessment waiver dated February 18, 1926 and covering the year 1918. Said document was received and marked "Respondent's Exhibit A".

Respondent offered in evidence an assessment waiver dated November 18, 1926. Said document was received and marked "Respondent's Exhibit B".

Respondent offered in evidence a collection waiver dated December 15, 1927. Said document was received and marked "Respondent's Exhibit C".

Respondent offered in evidence a collection waiver dated October 17, 1928 and signed for petitioner by H. C. New-

mann, Attorney-in-Fact. Said document was received and marked "Respondent's Exhibit D". Included in said Exhibit was a letter from Mr. Newmann. Petitioner admitted the authority of Mr. Newmann to sign in his behalf.

Respondent offered in evidence a collection waiver dated September 27, 1929. Said document was received in evidence and marked "Respondent's Exhibit E".

Respondent offered in evidence a claim in abatement executed by petitioner March 20, 1924, and for the sum of \$42,702.50. Said document was received and marked "Respondent's Exhibit E".

47 Respondent offered in evidence a letter dated November 5, 1926 and addressed to petitioner and pertaining to his tax liability from 1918 to 1921 inclusive. Said letter was received and marked "Respondent's Exhibit H".

Respondent offered in evidence a letter dated February 13, 1926. Said letter was received and marked "Respondent's Exhibit I".

It was stipulated by the parties that the testimony of Mr. Bittinger and Mr. Blair in the case of Herman C. Fleitmann, No. 28451 might be taken as part of the testimony in this case.

D. H. Blair, being called by the petitioner and having been duly sworn, testified in effect as follows:

I don't know that I have seen respondent's Exhibits A, B, C, and D, before. None of them was signed by me personally.

Robert H. Lucas, being called by the petitioner and having been duly sworn, testified in effect as follows:

I was Commissioner of Internal Revenue from June 1, 1929 to August 15, 1930.

I do not know that I have ever seen respondent's Exhibit E before.

George H. Sanvigne, being called by the petitioner and having been duly sworn, testified in effect as follows:

I am Chief of the Income Tax Section of the office of Collector of Internal Revenue for the Third Collection
48 District. I have held that position since June, 1923. Charles W. Anderson is the Collector for that District. I am familiar with the signature of Mr. Anderson.

Respondent's Exhibit E, was not signed by Mr. Anderson. I could not say whether or not Mr. Anderson signed respondent's Exhibits C and D.

The following stipulation having been executed by the parties hereto through their respective attorneys was spread upon the records of the Court:

“Docket Nos. 28451-17121.

HERMAN C. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation.

“It is stipulated between the parties that at a hearing before the Board at Washington, October 8, 1930, in the Appeal of Herman C. Fleitmann, Docket No. 28451, Mr. David H. Blair, former Commissioner of Internal Revenue, called as a witness for the petitioner, testified on direct examination in respect of petitioner's Exhibits 3, 4, 5 and 6, produced in evidence in that proceeding, as follows (Transcript, Page 59):

49 “A. I do not think I ever saw them until this morning.

Q. Those waivers are not signed by you personally? A. No, that is not. That one is not. None of them are signed by me personally. I signed very few waivers during my term of office.

Q. And you authorized at one time, did you not, Mr. Blair, Mr. H. B. Robinson to sign waivers for you? A. Yes, I authorized him perhaps more than once. He was head of different divisions, and he had more than one authority from me to sign waivers, and that is a photostatic copy of my signature of authorization.”

It is now stipulated that should Mr. Blair be called as a witness in the Appeals of Herman C. Fleitmann, Docket No. 17121, and Frederick T. Fleitmann, Docket No. 28450, that he would testify in the same manner in respect of waivers or consents in writing, more particularly identified as Exhibits 1, 2, 3 and 4, attached to respondent's amended answer filed September 24, 1930, in Docket No. 17121.

It is also stipulated that at a hearing in the Appeal of Frederick T. Fleitmann, Docket No. 28450, Mr. Robert H. Lucas, former Commissioner of Internal Revenue, being called as a witness for the petitioner, testified on direct examination concerning respondent's Exhibit E as follows (Transcript, Page 23):

50 "Q. Mr. Lucas, I show you respondent's Exhibit E, and ask you to state when you first saw that waiver? A. I do not know that I have ever seen (it) before."

It is stipulated that if Mr. Lucas were called to testify in the Appeal of Herman C. Fleitmann, Docket No. 17121, in respect of Exhibit 5 attached to respondent's amended answer in said Docket No. 17121, that he would testify in the same manner as last above set forth.

It is further stipulated and agreed that the testimony of all the witnesses taken in the three appeals described in the caption of this stipulation may be considered by the Board as a part of the record in each appeal with the same effect as if taken in each appeal in so far as the same may be applicable."

Henry B. Robinson, being called by the Petitioner and having been duly sworn, testified in effect as follows:

Direct examination.

By the respondent:

I did not sign the name D. H. Blair and the initials H. B. R., either to respondent's Exhibit A or respondent's Exhibit B. Miss Mead signed Exhibit A, and Miss Van Amburg signed Exhibit B. The first time I recall having seen Exhibits A and B was this morning.

Cross-examination.

By respondent:

Q. Referring to Exhibits A and B, which have just been shown to you, I will ask you whether or not these waivers were signed under your direction.

51 Mr. Friedman: That question is very leading and calls for a conclusion.

Mr. Low: This is cross examination and the witness would certainly be the one who would have these facts in mind.

The Member: I think I will overrule the objection.

Mr. Friedman: If your Honor please, your Honor must not overlook the fact while this witness is my witness, he is a Government official, and is in effect a hostile witness.

The Member: He has not indicated to me by his testimony that he is not frankly answering the questions that are propounded. Certainly I do not know that Mr. Robinson, I cannot imagine where Mr. Robinson would have any personal interest in it, whether it means anything to him individually how the matter goes. He is not a person that has some monetary interests.

Mr. Friedman: All these Government officials I have called with the exception of Mr. Blair and Mr. Lucas have been interviewed by Government counsel prior to the hearing. The testimony has been gone over with the Government prior to the hearing.

Mr. Low: I object to that. Even if they did, it does not make any difference.

52 Mr. Friedman: I am bringing that out to show that the Government should not be permitted to lead, in effect, its own witnesses, and this question asked Mr. Robinson is leading and also calls for a conclusion of law.

The Member: It seems to me Mr. Robinson at the last hearing substantially covered this same ground. He went over the whole situation before, and I think the objection ought to be overruled.

Mr. Friedman: Exception.

The Member: Exception.

Mr. Low: Read the question.

(The pending question was thereupon read by the reporter as follows:)

“Q. Referring to exhibits A and B, which have just been shown to you, I will ask you whether or not these waivers were signed under your direction.”

A. They were.

By Mr. Low:

Q. Mr. Robinson, will you outline briefly the custom and routine with reference to waivers during the period involved in this case, and these particular waivers I refer to are dated February 18, 1926, and November 18, 1926. A. Waivers coming in which were in great number were all brought to me for the purpose of seeing whether they met the requirements of the Bureau, and for the necessary signatures to record their acceptance.

53 Q. State whether or not you issued instructions to those in your office or under your supervision, with reference to whether or not waivers should be brought to your desk. A. I issued instructions that they be brought to my desk.

The instructions were not in writing. So far as I know they were never disregarded. As a rule the waivers were signed at my desk. My desk was a large double desk and the person signing waivers sat opposite me at the desk.

By Mr. Low:

Q. State what authorization you did give those people who signed waivers for you? A. I merely directed for them to affix the name my initials for me, and that was only in those instances where the number of waivers were so great the necessity for having expeditious action on them was apparent.

By Mr. Friedman: I move to strike the additional response as not being responsive to the question.

The Member: I will deny the motion.

Mr. Friedman: Exception.

The Member: Exception.

By Mr. Low:

Q. Mr. Robinson, in stating that you do not recall of ever having seen exhibits A and B which were shown you by

54 petitioner's counsel, do you mean you did not see them before? A. No, sir, I do not mean to say I never saw them before. I said I do not recall seeing them.

Q. State whether or not in the ordinary routine you would ultimately have seen these waivers? A. Yes.

Q. But you mean to say you do not now recall having seen these particular waivers? A. That is it. Naturally there were thousands and thousands coming to my desk. I cannot recall all of them.

Q. In stating the waivers were brought to your desk as I understood your testimony, for the purpose of determining whether or not they should be accepted, who exercised that function.

Mr. Friedman: I object to that as calling for a conclusion. We know what happened. Mr. Robinson testified where they went and who exercised discretion as a matter of law, which we have to decide, if it becomes material to decide.

The Member: Objection overruled.

Mr. Friedman: Exception.

The Member: Exception.

Mr. Low: Read the question.

(The pending question was thereupon read by the reporter as follows:)

“Q. In stating the waivers were brought to your desk, as I understood your testimony, for the purpose of determining whether or not they should be accepted, who exercised that function.”

A. I did.

By Mr. Low:

Q. Did you ever at any time authorize anybody else to determine whether or not a waiver should be accepted?

The Witness: No, sir.

55 Mr. Low: State whether at times questions would arise in your mind with reference to whether or not waivers would be accepted.

The Witness: Yes.

Mr. Low: State whether on those occasions you would call for the file.

The Witness: I did.

Mr. Low: Did you on those occasions review the file or have it reviewed for you for the purpose of determining whether or not waivers should be accepted?

Mr. Friedman: I object to the constant leading on the part of Government counsel. This is a Government witness, and the Government is leading him right straight through. Every question is leading, certainly the question prior to this and this question are very leading. He can ask the witness what he did. There is no use putting the words in the witness' mouth.

The Member: Objection overruled.

Mr. Friedman: Exception.

The Witness: I usually called for the auditor and the file and questioned the auditor, and if necessary would look at the file or take the auditor's statement of facts concerning the case, in order to aid me in determining whether or not waivers were acceptable.

56 Redirect examination by petitioner.

By Mr. Friedman:

Q. Mr. Robinson, the heads of the divisions, including yourself, issued instructions to the auditors from time to time, did they not as to the general routine of the office?

A. Yes.

Q. And those instructions at times related to the audit of cases and expediting cases and matters of that kind?

A. Yes.

Q. Those instructions were usually in writing, were they not, Mr. Robinson? A. Sometimes in writing.

Q. Mr. Robinson, were they usually in writing?

Mr. Low: He answered the question. I do not like the attitude this counsel takes toward the witness.

Mr. Friedman: I have a right to examine the witness, Mr. Low. He is a government official.

57 The Witness: It is rather difficult to answer "usually", because we are giving instructions all the way along, and sometimes when necessary they are reduced to writing, so that they will have them for reference.

* * * * *

Q. When you received instructions from the deputy Commissioner, was it your custom to relay those instructions

and pass them on down to the section chiefs? A. Yes. Just a moment. You mean written instructions?

Q. Yes. A. Yes.

Q. And that was done as a usual thing, wasn't it? A. Yes.

Q. But no such written instructions were passed down as to signing waivers? A. No, sir.

There was a door which was always open between my office and the secretary's office, and my secretary sat in my sight all the time. I was in one room and she was in the other room. My secretaries did not sign my name, H. B. Robinson, to waivers. They signed the name of D. H. Blair, the Commissioner and the initials H. B. R., under it. I never authorized them in writing to sign either.

58 Recross-examination by the respondent:

Eight men in my division are now authorized to sign waivers. The number of waivers was so great that it was necessary to have additional men.

Redirect examination by petitioner:

The additional men were authorized to sign waivers in the latter part of 1927 or early part of 1928. They were authorized directly by the Commissioner.

John S. Shea, being called by the petitioner and having been duly sworn, testified in effect as follows:

Direct examination:

I am Chief Office Deputy Collector Internal Revenue, Third District, New York. I have held that position since September 1, 1923. The Collector of that District is Charles W. Anderson.

Mr. Friedman: If your Honor please, there is another witness here from the Collector's Office, Mr. O'Brien, and I would like to ask that he be excluded from the room.

The Member: Why?

Mr. Friedman: His testimony will be along the same line as Mr. Shea, covering substantially the same questions, and I would like to interrogate the witnesses separately and

would not like to have Mr. O'Brien have the privilege of Mr. Shea's answer.

Mr. Low: There is no question of bad faith. The Commissioner frankly admits some waivers were not
59 signed by one man, and we are proceeding along the line that fact is admitted. There is no fraud and no question of bad faith, and I see no occasion for such a motion.

The Member: It is not a matter of opinion, it is a question of fact.

Mr. Friedman: It is a question of fact.

The Member: I do not think unless you make more showing than that to exclude witnesses I will grant your motion. If it is a question of opinion, frequently you do that, because opinion is something rather indefinite.

Mr. Friedman: I want to state for the record right now that I do not believe some of the Government witnesses have been telling the truth, and I have the testimony of Mr. Anderson here where he deliberately lied.

The Member: There is a method of establishing that, and it does not seem to me that statements of that kind should be lightly made by counsel, that some Government officials committed perjury, unless counsel is ready to establish it. The proper place to make such a statement is before a grand jury. It is a serious matter when you charge perjury.

Mr. Friedman: I am willing to stand on a charge in this connection. The record will speak for itself. That is why I asked your Honor. I am not accusing this witness of
60 perjury, that is, I am not accusing O'Brien of perjury. He has not testified, but I think we are entitled to have them excluded if their testimony is only to relate to substantially the same thing.

* * * * *

The Member: My understanding is that it is not done, certainly in my practice in the courts, it is not done unless there is a good substantial showing about it. It is rather unusual to exclude Government officials testifying on a mere matter of routine in connection with their administration and in connection with matters, I take it, where they have no personal or monetary interest.

Mr. Friedman: I have been in the Government service and so has your Honor. Every Government official has pride in believing that he has done right, as believing he has performed his duty, the duties that he was supposed to perform and that pride is as strong, if not stronger, than a monetary interest.

The Member: I do not think you have made any showing that warrants the excluding of witnesses. I will deny the motion.

Mr. Friedman: Exception.

I did not sign the name Charles W. Anderson to respondent's Exhibit E. I did not typewrite the name D. H. Blair on respondent's Exhibit- C and D, but I did write the name Charles W. Anderson on both these latter Exhibits. I know who signed petitioner's Exhibit 1 (28451). I did not sign it and I know that Charles W. Anderson did not sign it.

61 Cross-examination:

I am familiar with the custom and routine in the Collector's office. Waivers are usually brought up to the front office to my desk along with other important mail and all matters of that character are carried in to the Collector for his scrutiny, generally by me in person or by a stenographer. The Collector usually goes over them to ascertain whether or not they are properly executed. He directed me to sign them. I know who signed respondent's Exhibit E, and petitioner's Exhibit 1, in case 28451. Those waivers were signed by William J. O'Brien. In all probability I was out at the time and he proceeded in the usual way by taking them to the Collector.

Redirect examination.

By Mr. Friedman:

Q. You do not know what Mr. O'Brian did with those waivers, know of your own knowledge? A. Of my own knowledge I would say that that was the procedure we religiously followed, and O'Brian would not deviate from that.

Q. I am trying to find out what you actually know. You were not there when Mr. O'Brian signed the waiver? A. Perhaps not.

Q. You did not see Mr. O'Brian take the waivers in to the collector? A. No.

62 Q. Then you do not know except you believe from the practice that he did? A. Yes, we usually followed the proper practice in this sort of thing.

Q. How do you know Mr. O'Brien followed the practice? A. Well, I take it, being right close to me, they understood the practice, and I would always tell them if anything of any importance came in to take it into the collector's office and have it certified to as approved if I happened to be away.

Q. You do not know that he did it in this case, as to these two waivers? A. I will not say that, not in this particular case.

Q. What do you mean by that answer? A. I cannot say in this particular case, certify that he did that under my direction. It was the custom and he knew it.

In the absence of the Collector I was usually designated to act in his stead.

I never had authority from the Commissioner of Internal Revenue during the years 1927, 1928 and 1929 to sign waivers for him.

Mr. John S. Shea, being called by the respondent and having been duly sworn, testified in effect as follows:

The Third Collection District of New York collected over \$200,000,000.00 a year during the years 1926, 1927, 1928 and 1929.

63 **Miss Rene Van Amburg**, being called by the petitioner and having been duly sworn, testified in effect as follows:

Direct examination by the petitioner:

Since April 1926, I have been employed in Mr. Robinson's division of the Income Tax Unit. During that time I served as secretary to Mr. Robinson. Miss Mead, whom I succeeded, left about April 20, 1926. I signed the name D. H. Blair to the respondent's Exhibit B. I occupied the next

room to Mr. Robinson, but I could look through the door. My desk was just outside the door. The room was separate. My salary was \$2,000.00. Mr. Robinson gave me general instructions to sign waivers. There were instructions for all waivers how they were to be handled. The instructions were not in writing.

Cross-examination by respondent:

I do not recall signing respondent's Exhibit B specifically. The conditions under which waivers were signed by me were as follows. Waivers were sent to us from the sections and were given to Mr. Robinson. He looked them over and put them across the desk. The waivers were actually signed in Mr. Robinson's office and at his desk. It was a double desk and Mr. Robinson would pass them across it. No particular time was set aside for their signing.

Redirect examination by petitioner:

I was given no instructions by Commissioner Blair or Commissioner Lucas to sign waivers.

Mr. Robinson's general instructions were to sign the Commissioner's name and Mr. Robinson's initials after he had seen them. Mr. Robinson signed some of the waivers. I do not know whether Mr. Robinson was in his office on October 1, 1926, November 1, 1926 and the 13th of November, 1926. I have no present recollection of the circumstances under which I signed this waiver. I am
64 testifying from my knowledge of what the practice was. All waivers were signed at Mr. Robinson's desk.

Respondent offered in evidence a waiver dated February 18, 1924. This waiver had not been signed by the Commissioner. It was received and marked "Respondent's Exhibit J".

Respondent offered in evidence a copy of a letter mailed February 7, to Frederick T. Fleitmann and relating to his tax liability for 1918. Said letter was received and marked "Respondent's Exhibit K".

Respondent offered in evidence a copy of a protest filed with the Unit and received by the personal audit division on March 7, 1924. Said document was received and marked "Respondent's Exhibit L".

Respondent offered in evidence a copy of a letter dated February 13, 1926, and addressed to Frederick T. Fleitmann. Said letter was received and marked "Respondent's Exhibit M".

Respondent offered in evidence a copy of a letter dated December 16, 1927, addressed to Frederick T. Fleitmann and signed by Charles W. Anderson, Collector. Said letter was received and marked "Respondent's Exhibit N".

Respondent offered in evidence a letter dated November 5, 1928, addressed to Frederick T. Fleitmann and signed by Charles W. Anderson. Said letter was received and marked "Respondent's Exhibit O".

Respondent offered in evidence a copy of a letter dated September 23, 1929, addressed to Frederick T. Fleitmann and signed by Charles W. Anderson, Collector. Said letter was received and marked "Respondent's Exhibit P".

65 Respondent offered in evidence a letter dated May 3, 1926, addressed to the Commissioner of Internal Revenue and signed by Frederick T. Fleitmann. Said letter was received and marked "Respondent's Exhibit Q".

R. Kemp Slaughter, being called by the respondent and having been duly sworn, testified as follows:

Direct examination by respondent:

I am a lawyer and accountant in active practice in Washington and a member of the firm of Patterson, Teele and Dennis of New York and Washington.

I represented Frederick T. Fleitmann with reference to his tax liability for probably two or three years beginning about March 28, 1924. The matter was in my hands at the time the case was pending before the Bureau. After that it went into the hands of other parties.

Respondent offered in evidence a letter dated May 6, 1926, and signed by R. Kemp Slaughter. The signature was identified, and the letter was received and marked "Respondent's Exhibit R". Witness stated that during that period he represented Frederick T. Fleitmann with respect to his 1918 income tax.

Respondent offered in evidence a letter signed by R. Kemp Slaughter and dated November 2, 1926. The signature was identified by the witness also a notation in ink in

his handwriting. The letter was received and marked "Respondent's Exhibit S".

Respondent offered in evidence a certified copy of a mimeograph communication addressed to the Collector of Internal Revenue and dated September 1, 1925. Said document was received and marked "Respondent's Exhibit W".

66 Respondent offered in evidence a mimeograph addressed to heads of divisions, etc., dated December 18, 1925. Said document was received and marked "Respondent's Exhibit X".

Respondent offered in evidence a mimeograph signed by C. R. Nash, Assistant to the Commissioner and dated August 20, 1926. Said document was received and marked "Respondent's Exhibit Y".

Respondent offered in evidence a certified copy of a mimeograph signed by C. R. Nash, Acting Commissioner, and dated February 28, 1928. Said document was received and marked "Respondent's Exhibit Z".

Respondent offered in evidence a certified copy of a mimeograph dated March 6, 1927 and signed D. H. Blair, Commissioner. Said document was received and marked "Respondent's Exhibit AA".

Respondent offered in evidence a certified copy of a letter dated December 18, 1925, addressed to Mr. Burnett, Deputy Commissioner, and signed by Robert H. Lucas, Commissioner. Said document was received and marked "Respondent's Exhibit BB".

Respondent offered in evidence a certified copy of a letter dated December 21, 1929, addressed to Charles W. Anderson, Collector, and signed by Robert H. Lucas. Said document was received and marked "Respondent's Exhibit CC".

Respondent offered in evidence a letter dated November 29, 1926, and relating to Respondent's Exhibit B in this case. Said letter was received and marked "Respondent's Exhibit DD".

The above and foregoing statement of evidence together with exhibits appended hereto contain all the evidence introduced before the Board material to a consideration of
67 the assignments of error as set forth in the petitioner's petition for review of the decision entered herein by the United States Board of Tax Appeals.

It is hereby agreed that said statement as made may be approved by the Board of Tax Appeals without further

notice to any party hereto, and that when so approved may be filed in the Clerk's office and become a part of the record for the purpose of the petition for review in said cause filed by Frederick T. Fleitmann, petitioner.

HOWE P. COCHRAN,
Attorney for Petitioner.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Dated this 8 day of March, 1932.

The aforesaid statement of evidence in the petition for review of Frederick T. Fleitmann, petitioner, vs. Commissioner of Internal Revenue, respondent, is hereby approved and signed and ordered to be made of record in the above-entitled cause this 25 day of March, 1932.

C. ROGERS ARUNDELL,
Member United States Board of Tax Appeals.

68 Treasury Department, Internal Revenue Service,
Form 872A.

Received Feb. 19, 1926.

*Income and Profits Tax Waiver for Taxable Years Ended
Prior to January 1, 1922.*

IT:CR:A. CCB.

Feb. 18, 1926.

In pursuance of the provisions of existing Internal Revenue Laws F. T. Fleitmann, a taxpayer of New York, N. Y., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1918 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said

Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

[Affix seal here.] FREDK. T. FLEITMANN,

Taxpayer,

By ———.

D. H. BLAIR,

Commissioner.

H. B. R.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

U. S. Board of Tax Appeals, Div. —, Docket 28450. Admitted in evidence Oct. 8, 1930. Petitioner's —. Respondent's Exhibit A.

69 Treasury Department, Internal Revenue Service,
Form 872 (Revised Jan., 1926).

*Income and Profits Tax Waiver for Taxable Years Ended
Prior to January 1, 1923.*

November 18th, 1926.

In pursuance of the provisions of existing Internal Revenue Laws Frederick T. Fleitmann, a taxpayer of New York, New York, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1918, 1919, 1920 and 1921 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said

Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

FREDK. T. FLEITMANN,

Taxpayer,

By ———.

D. H. BLAIR,

Commissioner.

H. B. R.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

U. S. Board of Tax Appeals, Div. —, Docket 28450. Admitted in evidence Oct. 8, 1930. Petitioner's ——. Respondent's Exhibit B.

70

Tax Collection Waiver.

Dec. 15th, 1927.

It is hereby agreed by and between Fred'k T. Fleitman of 356 4th Ave., N. Y. C., party of the first part and the Commissioner of Internal Revenue, party of the second part, that the amount of \$42,702.50 representing an assessment of income tax for the year(s) 1918 made against the said party of the first part, appearing on the Wash.-Mar. 15 Spl. 3-1924 assessment list, page 1, line 5, for the Third district of N. Y., may be collected (together with such interest, penalties, or other additions as are provided by law) from said party of the first part by distraint or by a proceeding in court begun at any time prior to December 31st, 1928.

FREDK. FLEITMANN,

(Taxpayer,)

By ———.

D. H. BLAIR,

Commissioner of Internal Revenue,

By CHAS. W. ANDERSON,

Collector of Internal Revenue,

Third District of New York.

If this waiver is executed on behalf of a corporation it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Received Jan. 18, 1928. General Counsel's Office, Bureau of Internal Revenue.

U. S. Board of Tax Appeals, Div. —, Docket 28450. Admitted in evidence Oct. 8, 1930. Petitioner's ——. Respondent's Exhibit C.

71 Form 900, Treasury Department, Internal Revenue Service, January, 1928.

Tax Collection Waiver.

(Date:) October 17th, 1928.

It is hereby agreed by and between Frederick T. Fleitman of 356 Fourth Avenue, New York, New York, party of the first part, and the Commissioner of Internal Revenue, party of the second part, that the amount of \$42,702.50, representing an assessment of (Kind of tax) Income tax for the year(s) 1918 made against the said party of the first part, appearing on the W. A. Mar. 15 Spl. 3 1924 assessment list, page 1, line 5, for the district of Third New York, may be collected (together with such interest, penalties, or other additions as are provided for by law) from said party of the first part by distraint or by a proceeding in court begun at any time prior to December 31st, 1929.

FREDERICK T. FLEITMANN,

(Taxpayer,)

By H. C. NEWMANN,

Attorney-in-Fact.

D. H. BLAIR,

Commissioner of Internal Revenue,

By CHAS. W. ANDERSON,

Collector of Internal Revenue.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the

corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Office of the Collector of Internal Revenue, Third District, New York. Received Nov. 14, 1928. No remittance. Received Mar. —, 1929, Special Advisory Committee.

U. S. Board of Tax Appeals, Div. —, Docket 28450. Admitted in evidence Oct. 8, 1930. Petitioner's ——. Respondent's Exhibit D.

72 356 Fourth Avenue, New York.

Office of the Collector of Internal Revenue, Third District, N. Y. Received Nov. 14, 1928.

Office of the Collector of Internal Revenue, Third District, New York. Received Nov. 14, 1928. No remittance.

IT:UNIT. GHS:JJS:ARD.

November 12th, 1928.

Collector of Internal Revenue,
Third District,
Broadway at 57th Street,
New York City.

DEAR SIR:

In compliance with your letter of the 5th inst. addressed to Mr. Frederick T. Fleitmann, 356 Fourth Avenue, New York, I beg to return herein waiver, in duplicate, covering outstanding tax of \$42,702.50 for the year 1918, signed by me under his general power of attorney, copy of which is attached hereto. However, I am mailing duplicate copies of the waiver to Mr. Fleitmann in Europe for his signature which, after they are returned to me, may be exchanged for the present ones, if you so desire.

Yours very truly,

FREDERICK T. FLEITMANN,
By H. C. NEWMANN,
Attorney-in-Fact.

CLAIM FOR

(Mar 15 Sp 3-19)

IMPORTANT

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

- ☒ ABATEMENT OF TAX ASSESSED
☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
☐ REFUND OF TAXES ILLEGALLY COLLECTED
☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION	
District -	S-1
Account number	
OFFICE OF THE COLLECTOR OF INTERNAL REVENUE RECEIVED 24th March 1924 Collector of Internal Revenue	

State of New York

County of New York

NOTICE TO COLLECTOR

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

APR 2 1924

CLAIMS CONTROL SECTION

F. T. FLEITMANN, ESQ.

(Name of taxpayer or purchaser of stamps.)

355 FOURTH AVENUE.

(Residence—give street and number as well as city or town and State.)

NEW YORK.

N.Y.

(Business address.)

TYPE
OR
PRINT

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

- | | PERIOD | YEAR |
|--|-------------|-----------------------------------|
| 1. Business in which engaged | From Jan. 1 | 1918 |
| 2. Character of assessment or tax | Dec. 31 | 1918 |
| 3. Amount of assessment or stamps purchased | | \$ 42,702.50 |
| 4. Reduction of Tax Liability requested (Income and Profits Tax) | | \$ 42,702.50 |
| 5. Amount to be abated | | \$ |
| 6. Amount to be refunded (or such greater amount as is legally refundable) | | \$ |
| 7. Dates of payment (see Collector's receipts or indorsements of canceled checks) | | |
| (If statement covers income tax liability, items 8-11, inclusive, must be answered.) | | |
| 8. District in which return (if any) was filed | 2nd. | New York |
| 9. District in which unpaid assessment appears | 3rd. | New York - Notice attached hereto |
| 10. Amount of overpayment claimed as credit | | \$ |
| 11. Unpaid assessment against which credit is asked; period from | | \$ |

Deponent verily believes that this application should be allowed for the following reasons:

See Rider attached hereto

No. 5656. Frederick T. Fleitmann,
vs. Appellant
David Burrows, Commissioner vs.

(Attach additional sheets if necessary.)

Witnessed and subscribed before me this 20th day

of March 1924

Signed:

F. T. Fleitmann

NOTARY PUBLIC
New York County No. 222
New York RECISTER NO. 1111

COMMISSION EXPIRES MAR 1925

Subscribed to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.

42-11704

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

NAME OF TAXPAYER.	Character of assessment and period covered.	List.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
							\$		

Collector of Internal Revenue.

Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

TO WHOM SOLD OR ISSUED.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state:	
						Serial number.	Period commencing—
					\$		

Collector _____ District _____

Schedule Number _____

No. 5656. Frederick T. F. Leitmann,
vs. Appellant,
David Burnett, Commissioner, District _____

Allowed or Rejected Number _____

(Nature of tax.)

Claimant _____

Address _____

Examined and submitted for action _____, 19____

COMMITTEE ON CLAIMS

Claim examined by—

Claim approved by—

Chief of Division.

Amount claimed \$ _____

Amount allowed \$ _____

Amount rejected \$ _____

2-11704

GOVERNMENT PRINTING OFFICE

a3

73

Tax Collection Waiver.

Form 900, Treasury Department, Internal Revenue Service, January, 1928.

Received Nov. 15, 1929, Subsection D, Files Section, Records Division.

Received No. 1, Nov. 15, 1929.

(Date:) September 27, 1929.

It is hereby agreed by and between Frederick T. Fleitmann, of 356 4th Avenue, New York, N. Y., party of the first part, and the Commissioner of Internal Revenue, party of the second part, that the amount of \$42,702.50, representing an assessment of (Kind of tax) Income tax for the year 1918 made against the said party of the first part, appearing on the 1924 W. A. March assessment list, page 15, line Spl. 3, for the district of Third, New York, may be collected (together with such interest, penalties, or other additions as are provided for by law) from said party of the first part by distraint or by proceeding in court begun at any time prior to December 31, 1930.

(Taxpayer:) FRED. T. FLEITMANN,

By ———.

ROBERT H. LUCAS,

Commissioner of Internal Revenue,

By CHAS. W. ANDERSON,

Collector of Internal Revenue.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

U. S. Board of Tax Appeals, Div. —, Docket 28450. Admitted in evidence Oct. 8, 1930. Respondent's Exhibit E.

(Here follows reproduction of pages 74 and 75.)

76

1. This case is not a non-compliance case but on the contrary is under appeal. The appeal was filed on March 5, 1924 in compliance with 30 day letter addressed

to the taxpayer under the date of February 7, 1924. At the same time an Income and Profits Tax waiver was signed by the taxpayer and filed with the Commissioner of Internal Revenue. Investigation has shown that the waiver attached to the brief was overlooked and that all cases pending were listed for assessment as of March 1, 1924, regardless of whether or not the 30 day limitation had expired.

2. The taxpayer having appealed the case and filed a waiver, the listing of this additional assessment is only a matter of departmental routine and not a result of non-compliance on the part of the taxpayer under Section 250 of the Revenue Act.

3. The taxpayer in his brief has demonstrated that there is no additional tax due from him but on the contrary is entitled to a refund of tax paid in respect of the calendar year 1918. A claim for the refund was filed January 22, 1924 and has not yet been acted upon.

4. This claim for abatement should therefore be accepted pending determination by the Department of the issues under appeal.

(Here follows reproduction of page 77.)

78

RESPONDENT'S EXHIBIT H.

Filed Oct. 8, 1930.

Docket 28450.

(40M.)

IT:CR:G-5. SMC.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

(Stamped:) Nov. 6, 1926.

(Stamped:) Nov. 5, 1926.

Mr. Frederick T. Fleitmann,
356 Fourth Avenue,
New York, New York.

SIR:

An examination of your case indicates that the period of limitations prescribed by law or as extended by a waiver

To avoid penalty and interest this tax must be paid to the Collector of Internal Revenue at 250 W. 67th St., NYC, not later than MAR 22 1924

NOTICE AND DEMAND FOR TAX
Form 7458

UNITED STATES INTERNAL REVENUE SERVICE

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of 5 per cent of the amount of the tax shall be added, plus interest at the rate of 1 per cent per month, from _____ until paid.

DATE MAR 12 1924

NAME AND ADDRESS

FLEITMANN FREDERICK Y
356 4TH AVE
NEW YORK N Y

4

ITEMS

MC 250 D
1918 305411
0A 2/2/24

TOTAL ASSESSMENT

42702 90

RETURN THIS FORM WITH REMITTANCE

No 5756. Frederick J. Fleitmann.
vs. Appellant,
David Burnett, Commissioner of

now on file, will presently expire and bar any additional assessment against you for the calendar year(s) 1918 to 1921, inclusive, unless you consent to extend further the period of limitation. It is desired to give you an opportunity to present any evidence or contentions relative to the determination of your correct tax liability, but the Bureau will be obliged to protect the interests of the Government by notifying you of its final determination of any deficiency unless you furnish waivers in proper form.

It is, therefore, suggested that you execute and return to this office within ten days from the date of this letter the enclosed forms of waiver by which you will note that you and your affiliated companies separately agree to an extension until December 31, 1927, of the statutory period of limitations within which additional tax may be assessed for the years mentioned.

Respectfully,

C. R. NASH,
Assistant to the Commissioner,
By W. CUNGATE,
Chief of Section.

Enclosures: Waivers.

79

RESPONDENT'S EXHIBIT I.

Filed Oct. 8, 1930.

Docket 28450.

(668M.)

IT:CR:A. CCB.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

(Stamped:) Feb. 13, 1926.

F. T. Fleitmann,
356 Fourth Avenue,
New York, N. Y.

SIR:

An examination of your case indicates that the period of limitations prescribed by law or as extended by a waiver now on file, will presently expire and bar any additional assessment against you for the calendar year(s) 1918 to

1921 unless you consent to extend further the period of limitation. It is desired to give you an opportunity to present any evidence or contentions relative to the determination of your correct tax liability, but the Bureau will be obliged to protect the interests of the Government by notifying you of its final determination of any deficiency or by making an immediate assessment of such deficiency under Section 274(d) of the Revenue Act of 1924 unless you furnish waivers in proper form.

It is, therefore, suggested that you execute and return to this office within five days from the date of this letter the enclosed forms of waiver by which you will note that you and your affiliated companies separately agree to an extension until December 31, 1926, of the statutory period of limitations within which additional tax may be assessed for the years mentioned.

Respectfully,

C. R. NASH,
Assistant to the Commissioner,
By F. R. LEARY,
Chief of Section.

Feb. 18, 1926. (Stamped.)

Enclosures: Waivers.

Referred to Washington.

80

RESPONDENT'S EXHIBIT J.

Filed Oct. 27, 1930.

Docket 28450.

Income and Profits Tax Waiver.

356 Fourth Avenue, New York.

IT:PA-2. LHD-205-App.

February 18th, 1924.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, F. T. Fleitmann, of New York, New York, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said taxpayer, for the year 1918, under the

Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

FRED T. FLEITMANN,

Taxpayer,

By ————,
Commissioner.

81

RESPONDENT'S EXHIBIT K.

Filed Oct. 27, 1930.

Docket 28450.

IT:PA-2. LHD-205-App.

(Stamped:) Mailed.

(Stamped:) Feb. 7, 1924.

Mr. F. T. Fleitmann,
356 Fourth Avenue,
New York, New York.

SIR:

An examination of your income tax returns, and of your books of account and records for the years 1918, 1919 and 1920, discloses an additional tax for the year 1918 amounting to \$42,702.50, as shown in the attached statement.

In accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and to show cause or reason why this tax or deficiency should not be paid. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:PA-2-LHD-205-App.

It appears reasonable and fair, in the event that you desire to appeal from the conclusions set forth in this letter with respect to the adjustments for the year 1918, to request that you sign and return the enclosed form of waiver, agreeing to an extension of time of one year beyond the statutory period of limitation, or the statutory period of

limitation as extended by waivers already on file with the Bureau, within which additional tax may be assessed. This will avoid the necessity of making an immediate assessment and afford the Unit sufficient time to proceed in the regular manner to the consideration of the merits of your appeal or the additional information you desire to submit.

Treasury Decision No. 3492, setting forth the privilege of taxpayers in cases of appeal, is attached for your information and guidance.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

82 Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully,
(Signed)

J. G. BRIGHT,
Deputy Commissioner.

Inclosures: Waiver Form, T. D. 3492, Waiver. A. L.

83 *Statement.*

IT:PA-2. LHD-265-App.

(Stamped:) Mailed.
(Stamped:) Feb. 7, 1924.

In re Mr. F. T. Fleitmann, 356 Fourth Ave., New York, N. Y.

Year.	Additional tax.
1918	\$42,702.50
1919	None
1920	"
Total	\$42,702.50

The audit as made by the examining officer has been reviewed and approved by this office except that the net tax

previously assessed is \$3,895.67 instead of \$15,910.56 as shown by the Revenue Agent's Report.

(Stamped:) (Signed)

J. G. BRIGHT.

LK/lkp-1.

L. K. 2-4-24. A. L. R., 3. A. M. S. 2-4-24. D 2.

84

RESPONDENT'S EXHIBIT "L".

356 Fourth Avenue, New York.

March 5, 1924.

Commissioner of Internal Revenue,
Treasury Department,
Washington, D. C.:

Reference: IT:PA-2-LHD-205 App.

Re Proposed additional 1918 Income Tax, \$42,702.50.

Taxpayer: F. T. Fleitmann.

Address: 356 Fourth Avenue, New York, N. Y.

SIR:

Receipt is acknowledged of your communication of February 7, 1924 wherein an additional tax for the year 1918 amounting to \$42,702.50 is proposed.

* * * * *

In conclusion while there is no intention on my part to evade or avoid payment of any taxes which may be legally due I cannot but feel that further consideration should be given to the facts herein set forth and I request a conference with the unit for the purpose of discussing the matter in detail and amplifying any points which may not now appear clear. If the Department upon reconsideration will not cancel the proposed additional assessment of \$42,702.50 and allow a refund of \$8,550.16, on account of 1918 Income Tax paid I must and do hereby enter
85 an appeal to the Committee on Appeals and Review on the issues involved, not for the purpose of deferring payment of any tax due in respect of the taxable year 1918, but in order to secure the benefit of the privileges granted by Treasury Decision No. 3492.

Income & Profits Tax Waiver requested is attached hereto duly signed and dated February 18th, 1924.

Yours respectfully,

(Signed)

F. T. FLEITMANN.

5-5656a

Filed Oct. 27, 1930.

Docket 28450.

(668M.)

IT:CR:A. CCB.

(Stamped:) Mailed.

(Stamped:) Feb. 13, 1926.

F. T. Fleitmann,
356 Fourth Avenue,
New York, N. Y.

SIRS:

An examination of your case indicates that the period of limitations prescribed by law or as extended by a waiver now on file, will presently expire and bar any additional assessment against you for the calendar year(s) 1918 to 1921 unless you consent to extend further the period of limitation. It is desired to give you an opportunity to present any evidence or contentions relative to the determination of your correct tax liability, but the Bureau will be obliged to protect the interests of the Government by notifying you of its final determination of any deficiency or by making an immediate assessment of such deficiency under Section 274 (d) of the Revenue Act of 1924 unless you furnish waivers in proper form.

It is, therefore, suggested that you execute and return to this office within five days from the date of this letter the enclosed forms of waiver by which you will note that you and your affiliated companies separately agree to an extension until December 31, 1926, of the statutory period of limitations within which additional tax may be assessed for the years mentioned.

Respectfully,

C. R. NASH,

Assistant to the Commissioner,

(Stamped:) (Signed)

By F. R. LEARY,

Chief of Section.

Enclosures: Waivers.

C. C. B., 2/12/26.

87

RESPONDENT'S EXHIBIT N.

Filed Oct. 27, 1930.

Docket 28450.

IT:UNIT. GHS:JJS:SP.

December 16th, 1927.

Frederick T. Fleitman,
356 Fourth Avenue,
New York, New York:

There are attached hereto tax collection waivers in triplicate which are self-explanatory.

It is requested that you kindly sign two copies and forward same to this office, at least, by December 26th, in the enclosed envelope provided for that purpose, which requires no postage. The remaining copy may be retained for your records.

CHARLES W. ANDERSON,
Collector.

Encls.

88

RESPONDENT'S EXHIBIT O.

Filed Oct. 27, 1930.

Docket 28450.

IT:UNIT. GHS:JJS:ARD.

November 5th, 1928.

Frederick T. Fleitman,
356 Fourth Avenue,
New York, New York:

There is attached waiver covering outstanding tax of \$42,702.50 for the year 1918. Waiver covering this account, which was signed by you, expires on December 31st, 1928. Inasmuch as it appears that this account is still pending before the United States Board of Tax Appeals it is requested that the enclosed forms be signed and returned to this office as soon as possible.

CHARLES W. ANDERSON,
Collector.

Enc.

Filed Oct. 27, 1930.

Docket 28450.

IT:WAIVER:TRANS:GHS:JBMCE:LP.

September 25, 1929.

Frederick T. Fleitman,
356 4th Avenue,
N. Y., N. Y.:

There are attached hereto tax collection waivers in quadruplicate which are self-explanatory.

It is requested that you kindly sign three (3) copies and forward same to this office, at least by December 1, 1929 in the enclosed envelope provided for that purpose, which requires no postage.

CHARLES W. ANDERSON,
Collector.

Encls.

Filed Oct. 27, 1930.

Docket 28450.

(Stamped:) Received Consolidated Returns Audit Division May 6, 1926. — — —, Asst. Head of Division.

356 Fourth Avenue, New York.

May 3, 1926.

Commissioner of Internal Revenue,
Treasury Department,
Washington, D. C.

SIR:

The taxpayer protests the determination of his Income Tax for the year 1918 as set forth in letter from the Treasury Department dated April 8, 1926 and signed C. R. Nash, Assistant to the Commissioner, By W. L. Heap, Assistant

Head of Division, and requests a hearing in the Bureau for the purpose of amplifying the grounds of protest herein set forth.

(A) The name and address of the taxpayer is: Frederick T. Fleitmann, 356 Fourth Avenue, New York, New York.

(B) The date and symbols of the notice with respect to which a hearing is desired: Date: April 8, 1926; Symbols: IT-CR:G-9-CCB.

91 (C) The year involved and the amount of tax is as follows: Year, 1918; Amount of the tax in dispute, \$42,702.50.

(D) The findings to which the taxpayer takes exception may be briefly stated as follows:

1. That all dividends received from Fleitmann & Co., Inc., a corporation, are taxable to him as ordinary dividends and do not represent in part a return of capital.

2. That in addition to such dividends, his taxable income includes:

(a) 33-1/3% of the income of Fleitmann & Co., Inc., for the period January 1, 1918 to May 23, 1918	\$41,510.69
(b) 33-1/3% of the dividends received by Fleitman & Co., Inc., in respect of the period January 1, 1918 to May 23, 1918	11,863.50
	\$53,374.19

3. That a loss arising from Stock of the Lincrusta Works "Pallas Inc." of \$35,000.00 is an unallowable deduction.

(E) The grounds upon which the taxpayer relies, in connection with the above exceptions, may be briefly summarized as follows:

1. That his taxable income for the year involved cannot be correctly determined until the returns of the Corporation, Fleitmann & Co. Inc., have been finally audited.

92 2. That the corporate returns are now pending in the Consolidated Returns Division, and it is understood that a further field examination has been directed.

3. That such returns show that part of the dividends included as taxable income were paid from the profits and dividends of the period January 1 to May 23, 1918, which have also been included in taxable income.

4. That Fleitmann & Co., Inc., was incorporated on May 24, 1918, and took over the business of the partnership as of January 1, 1918, pursuant to the terms of an agreement and originally filed its tax return for the calendar year 1918, and based its dividends policy during 1918 and 1919, on the assumption that the entire profits of the year 1918 represented earned surplus.

5. That the stockholders reported such dividends as taxable income and raised no contention in regard thereto until a field examination disclosed that Fleitmann & Co., Inc., was not entitled to the benefit of Section 330 of the Revenue Act of 1918.

6. That on or about October 27, 1923, the corporation filed amended returns pursuant to the field examination, except that it further exercised its right to consolidate with the Fairmont Manufacturing Company by
93 virtue of ownership and control of over 97% of the outstanding voting stock of this Company.

7. That the field agents sought a partnership report for the period January 1, 1918 to May 23, 1918 and endeavored to secure the signature of a partner; but failing in this, included 25% of the income attributed to this period in the taxable income of the taxpayer for the year 1918 without making any adjustment in respect of the dividends received from Fleitmann & Co., Inc., and treated as declared from such profits in the corporate amended returns.

8. That the partnership of Fleitmann & Company terminated its existence at December 31, 1917, and the taxpayer's interest in the corporation, instead of being 33-1/3%, was only 30.75% and decreased to 27.47% during the year 1918, nor did he receive any part of these so-called partnership profits, either by way of stock, property or cash except insofar as dividends paid by the corporation may be regarded as being paid out of such profits.

9. That Section 330 of the Revenue Act of 1918 is a relief section and was not intended to impose a
94 hardship, and to some extent, double taxation on an individual.

10. That the deduction of \$35,000.00 claimed as a loss on Stock arose from the fact that the Lincrusta Works "Pallas Inc." was adjudicated a bankrupt on August 9, 1917.

11. That all efforts of reorganization failed and its assets were sold on January 9, 1918.

12. That the first and final dividend paid from the proceeds of the sale amount to 18% of the outstanding creditors' claims and was paid on April 30, 1918.

13. That an audit of his return disclosed that this loss was not claimed by him and was thereupon allowed by the Department, reference IT:PA:2 LLC-202-C and Certificate of Overassessment #212118 dated June 26, 1922 for \$12,014.89 issued and paid.

Please advise date and time selected for hearing in due course.

FRED. T. FLEITMANN.

STATE OF NEW YORK,

County of New York, ss:

Subscribed and sworn to before me this 5th day of May, 1926.

(Signed)

ANGELA McMANUS,

Notary Public.

Notary Public, Bronx County. Bronx County's Cl'k's No. 24. Reg's No. 2800. Certificate filed in New York County. N. Y. Co. Cl'k's No. 2, Reg's No. 8031. Commission expires March 30th, 1928. (Seal.)

95

RESPONDENT'S EXHIBIT R.

Filed Oct. 27, 1930.

Docket 28450.

Patterson, Teele and Dennis, Accountants and Auditors.

Arthur W. Teele, C. P. A.; John Whitmore, F. R. Carnegie Steele, C. A.; James Willing, C. A.; William H. Stumpfel, Stanley G. H. Fitch, C. P. A.; Edward H. Moeran, David Leslie Milne, C. A.; R. Kemp Slaughter, Harold B. Hart, C. P. A.

New York: 120 Broadway; Boston: 1 Federal Street; Baltimore: Citizens Nat'l Bank Bldg.; Washington: 815 15th Street N. W.

Cable Address: "Dignus."

815 15th Street N. W.,
Washington, D. C., May 6, 1926.

Mr. C. R. Nash,
Assistant to the Commissioner,
Treasury Department,
Washington, D. C.

DEAR SIR:

Frederick T. Fleitmann, William M. Fleitmann, Herman C. Fleitmann, 356 Fourth Ave., New York, N. Y. IT:CR:G-9-CCB.

I hand you herewith letters of protest in the above cases.
Yours very truly,

R. KEMP SLAUGHTER.

RKS:GSF.

(Stamped:) Received Consolidated Returns Audit Division May 6, 1926. — — —, Head of Division.

Received Consolidated Returns Audit Division May 6, 1926. — — —, Asst. Head of Division.

(Stamped:) May 6, 1926, Audit 8.

96 RESPONDENT'S EXHIBIT S.

Filed Oct. 27, 1930.

Docket 28450.

(Stamped:) 1926, Nov. 3, A. M. 9:19.

(Stamped:) Distribution Center, Con. Ret. Division, Nov. 3, 1926.

Patterson, Teele and Dennis, Accountants and Auditors.

Arthur W. Teele, C. P. A.; John Whitmore, F. R. Carnegie Steele, C. A.; James Willing, C. A.; William H. Stumpf, Stanley G. H. Fitch, C. P. A.; Edward H. Moeran, David Leslie Milne, C. A.; R. Kemp Slaughter, Harold B. Hart, C. P. A.

New York: 120 Broadway; Boston: 1 Federal Street;
Baltimore: Citizens Nat'l Bank Bldg.; Washington,
815 15th Street N. W.

Cable Address: "Dignus".

815 15th Street N. W.,
Washington, D. C., November 2, 1926.

Mr. C. R. Nash,
Assistant to the Commissioner,
Treasury Department,
Washington, D. C.

Attention Mr. W. L. Heap, Asst. Head of Division. Re
Frederick T. Fleitmann, 356 Fourth Avenue, New York,
N. Y. IT:CR:G-9-CCB.

DEAR SIR:

Reference is made to your letter of April 8, 1926 addressed to the above-named taxpayer wherein action was taken on a claim for abatement in the amount of \$42,702.50, filed March 2, 1924 against a proposed assessment for the taxable year 1918. In accordance with the suggestion contained in your letter of April 8th, a protest was filed under date of May 3, 1926 and specific request was made for a hearing for the purpose of discussing in detail the issues presented in the protest. No action whatever has been taken on the request for conference and no further communication with respect to the tax liability of Mr. Fleitmann for the year 1918 has been received by the taxpayer. But under date of October 25, 1926 the chief field deputy in the office of the Collector of Internal Revenue served notice on Mr. Fleitmann of a warrant for distraint for the collection of the deficiency of \$42,702.50. This deficiency was a jeopardy assessment made in March 1924 because a waiver had not been filed, and the Collector is undoubtedly endeavoring to clear his record by threatening distraint. It is believed that the matter can be more properly disposed of by granting this taxpayer a conference at an early date so that an overassessment certificate might be promptly issued. Will you kindly arrange for this. In the meantime I have suggested that a

Collection waiver be filed by the Taxpayer with the Collector to satisfy his requirements for the time being.

Yours very truly,

R. KEMP SLAUGHTER,
R. KEMP SLAUGHTER,
*Attorney-in-fact for and on Be-
half of Frederick T. Fleitmann.*

RKS:GSF.

You have since been furnished with a copy of the protest of May 3rd.

98 Under date of December 18, 1925, the Commissioner of Internal Revenue by I. T. U. Order No. 83 to the Heads of Divisions, Chiefs of Sections, Supervising Agents and Agents in Charge of Field Divisions and Others Concerned directed among other things:

99 RESPONDENT'S EXHIBIT "X".

"Any waiver received from a taxpayer shall be referred to the head of division in which the case is under consideration, who will determine whether it is acceptable. If a division in which the waiver is received does not have the return for the taxable year covered by the waiver, it shall be forwarded to the office of the Head of Records Division."

100 RESPONDENT'S EXHIBIT Y.

Filed Oct. 28, 1930.

Docket 28450.

A. & C. Mimeograph Coll. No. 3459.

Treasury Department, Washington, D. C.

Office of Commissioner of Internal Revenue.

Collection Waivers.

August 20, 1926.

Collectors of Internal Revenue:

The attention of Collectors is invited to the following quotations from the Revenue Act of 1926:

Section 278 (d).

"Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of

Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

Section 311 (b).

"Where the assessment of any tax imposed by this title or of any estate or gift tax imposed by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) in writing by the Commissioner and the executor."

Section 1109 (a) (3).

"Where the assessment of any tax imposed by this Act or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (A) within six year- after the assessment
101 of the tax, or (B) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

It will be seen from the foregoing provisions of the statute, that where an assessment of any class of tax has been made whether before or after the enactment of the Revenue Act of 1926, such tax may be collected by distraint or a proceeding in court only if begun within six years after the assessment of the tax, or prior to the expiration of any period agreed upon in writing by the Commissioner and the taxpayer, or, in the case of estate or gift tax, the executor. A distraint is begun within the meaning of the statute, in the

case of personal property, on the date on which the levy upon such property is made, and, in the case of real property, on the date on which notice of the time and place of sale is given to the person whose estate it is proposed to sell.

Attached hereto is a form of collection waiver which may be used in connection with any class of outstanding assessments. Collectors should mimeograph a quantity of this form of waiver sufficient for their needs. This form should be used exclusively for the purpose of waiving the six-year period of limitation upon collection of a tax after assessment, and when used, extreme care should be exercised to see that the correct amount of the outstanding assessment, or assessments, and the correct assessment list references are shown in the blank spaces provided for in the waiver form.

It will be noted that the law requires that the waivers should be signed by the Commissioner and the taxpayer, or, in the case of estate or gift tax, the executor. In order to obviate the necessity of sending collection waivers to Washington for the signature of the Commissioner, authority is hereby delegated to Collectors of Internal Revenue to sign such waivers in the name of the Commissioner as follows:

D. H. BLAIR,
Commissioner of Internal Revenue,
By — — —,
Collector of Internal Revenue.

The name of the Commissioner should not be typed or written on the waiver form prior to its execution by the taxpayer.

All collection waivers should be executed in duplicate. The original copy should be carefully preserved in a special file established in the office of the Collector for that purpose, and the duplicate, or carbon copy, should be mailed to the Commissioner of Internal Revenue, Washington, D. C., attention Records Division, Income Tax Unit.

Since the sections of the law quoted above make reference to an agreement in writing between the taxpayer and the Commissioner with respect to the waiving of the
102 period of limitation for the collection of the tax, all collection waivers which have already been secured

since enactment of the Revenue Act of 1926 should be signed by the Collector for the Commissioner in the manner outlined above.

Many of the waivers which were executed in accordance with A & C Mimeograph No. 3341 remain in effect only until December 31, 1926. This period may be extended by an agreement in writing by the Commissioner and the taxpayer on the revised form attached hereto. If, however, in such cases an extension waiver is not secured from the taxpayer, proper steps should be taken to protect the interests of the Government prior to the expiration of the original waivers.

Collectors should exercise extreme care with a view to preventing the running of the six-year statute in connection with the collection of all classes of taxes outstanding on the records of their respective offices.

Correspondence in connection with the procedure outlined herein should refer to the number of this mimeograph and to the symbols A & C: Col.

C. R. NASH,
Acting Commissioner.

Enc.

103 RESPONDENT'S EXHIBIT "Z".

IT-Mimeograph Coll. No. 3606, R. A. No. 445.

Treasury Department, Washington, D. C.

Office of Commissioner of Internal Revenue.

Income Tax Assessment and Collection Waivers.

February 28, 1928.

Collectors of Internal Revenue,
Internal Revenue Agents in Charge,
and Others Concerned:

* * * * * *

Assessment Waivers.

Internal Revenue Agents in Charge will be held responsible for procuring assessment waivers in all cases

referred to the field — for investigation where such action is necessary for the protection of the Government's interests.

Each such waiver secured from a taxpayer consenting to a later assessment of tax should be stamped with the date of its receipt and promptly signed on behalf of the Commissioner by the Internal Revenue Agent in Charge under his delegated authority. It is extremely important that this instruction with respect to the affixing of the Commissioner's signature to the waiver be strictly complied with in order to meet the requirements of Section 278 (c) of the Revenue Act of 1926 and obviate the possibility of the waiver being withdrawn before its acceptance with the resultant loss of revenue due to the running of the statute of limitations.

The name of the Commissioner should be typed and that of the Internal Revenue Agent in Charge should be written in ink in the following form:

D. H. BLAIR,
Commissioner of Internal Revenue.
By — — —,
Internal Revenue Agent in Charge.

In no case should the Commissioner's name be typed on the waiver prior to its execution by the taxpayer.

104 In cases where waivers covering years for which returns are in the field have been accepted by the Agent in Charge on behalf of the Commissioner, they should be forwarded to the Commissioner, attention of IT:R, with the Revenue Agent's report.

It is essential that all revenue agent's reports shall be forwarded at a sufficiently early date so that they will be received in Washington 45 days before the statute of limitations expires. This same procedure must be followed where a waiver is involved to insure the case being received in the Bureau 45 days prior to expiration of the waiver. Any exception must be called to attention of Bureau by wire if necessary.

Where a taxpayer advises that a waiver has been previously furnished and there is no advice from the Bureau to this effect or any record in the office of the field division of such waiver, there should be no objection on the part of the

taxpayer to furnishing a duplicate waiver and this should be requested in such cases.

* * * * *

Attached hereto is a form of collection waiver which may be used in connection with any class of outstanding assessments. Collectors should mimeograph a quantity of this form of waiver sufficient for their needs. This form should be used exclusively for the purpose of waiving the six-year period of limitation upon collection of a tax after assessment, and when used, extreme care should be exercised to see that the correct name of the taxpayer and the correct amount of the outstanding assessment, or assessments, and the correct assessment list references are shown in the blank spaces provided for in the waiver form.

It will be noted that the law requires that the waivers shall be signed by the Commissioner and the taxpayer. In order to obviate the necessity of sending collection waivers to Washington for the signature of the Commissioner, authority has been delegated to Collectors of Internal Revenue to sign such waivers in the name of the Commissioner as follows:

D. H. BLAIR,
Commissioner of Internal Revenue,
By ————,
Collector of Internal Revenue.

The name of the Commissioner should not be typed or written on the waiver form prior to its execution by the taxpayer.

All collection waivers should be executed in duplicate. The original copy should be carefully preserved in a special file established in the office of the Collector for that purpose, and the duplicate, or carbon copy should be mailed to the Commissioner of Internal Revenue, Washington,
105 D. C., attention Records Division, Income Tax Unit.

All waivers of limitations upon the collection of taxes should be signed immediately upon their receipt in the Bureau, or in the offices of collectors of internal revenue. Delay in signing may result in loss of revenue through the running of the statute of limitations before the acceptance of the waiver.

Special Points to be Observed with Respect to Both
Assessment and Collection Waivers.

Before approving waivers on behalf of the Commissioner, every effort should be made to see that they are in proper form. The form of waivers prepared by the Bureau were the result of a careful study of the factors to be considered in preserving the equities of both the Government and the taxpayer. In the interest of a uniform administrative procedure waivers should be accepted only in the form prepared by the Bureau. Collectors of Internal Revenue and Internal Revenue Agents in Charge, especially, should be careful to observe the rule that they have authority to sign waivers in the Commissioner's name only in the form outlined herein.

* * * * *

C. R. NASH,
Acting Commissioner.

106

RESPONDENT'S EXHIBIT AA.

Filed Oct. 28, 1930.

Docket 28450.

A. & C. Mimeograph Coll. No. 3609.

Treasury Department, Washington, D. C.

Office of Commissioner of Internal Revenue.

Responsibility for Securing Tax Collection Waivers.

March 6, 1928.

Collectors of Internal Revenue:

With respect to the securing of collection waivers, it has been found that the responsibility for this important duty is in certain Collectors' offices divided among two or more employees.

It has also been found that in certain cases employees in the Income Tax Divisions of Collectors' offices are charged with the duty of securing tax collection waivers in connection with all assessments not covered by warrants for distraint. In connection with those cases covered by warrants for distraint, the Chief of the Field Division is charged with the responsibility of securing tax collection waivers before the running of the Statute of Limitations.

In view of the vital importance of protecting tax assessments against the running of the Statute of Limitations, the Bureau is of the opinion that the responsibility for the securing of such waivers should be centralized in one employee who shall be answerable direct to the Collector. The Collector should confer upon the employee whom he designates for this duty the necessary authority to require that waivers be secured in advance of the running of the Statute of Limitations. If for any reason it appears that it will be difficult or impossible to secure a waiver, the designated employee should make his report direct to the Collector in ample time for the Collector to take the matter up with the Bureau with a view to securing advice in the premises.

The employee designated for the purpose of securing tax collection waivers should provide himself with all the necessary records in order that he may determine when waivers must be renewed and when the Statute will run on the outstanding assessments. These records should be maintained on 3 x 5 cards arranged in alphabetical order by assessment years. A special file for all tax collection waivers should be maintained by the designated employee under the direct supervision of the Collector.

107 Correspondence in regard to the procedure outlined herein should refer to the number of this mimeograph and to the symbols A&C:Col.

D. H. BLAIR,
Commissioner.

108 RESPONDENT'S EXHIBIT BB.

Filed Oct. 28, 1930.

Docket 28450.

December 18, 1929.

Memo. for Mr. Burnet,
Deputy Commissioner,
Head Income Tax Unit:

Re Signing of Waivers.

You are hereby authorized and requested to perform all administrative acts necessary to the carrying into imme-

diat effect of the following specific recommendations relating to the signing of assessment and collection waivers:

(1) That individual authorization to Collectors and Agents in Charge to sign collection waivers and assessment waivers be immediately executed in duplicate original by the Commissioner of Internal Revenue. That said individual authorization to Collectors of Internal Revenue read as follows:

“Until further notice and so long as you hold your present office as Collector of Internal Revenue, you are hereby authorized to sign my name to all assessment and/or collection waivers which have been or may hereafter be submitted in connection with assessments and/or collections for any taxable year. In each case, however, your initials should appear immediately under the signature, together with the date of such signing. This authorization as of this date supersedes any and all previous authorizations to sign the name of the Commissioner of Internal Revenue to waivers in connection with assessments and/or collections for all taxable years.

“As Commissioner of Internal Revenue, I hereby affirm, ratify and adopt, as my own act and deed, all your prior actions in signing the name of the Commissioner of Internal Revenue to assessment and/or collection waivers under authority of A&C Mimeograph, Coll. No. 3459, dated August 20, 1926, and IT-Mimeograph, Coll. No. 3606, R. A. No. 445, dated February 28, 1928, as amended by IT-Mimeograph, Coll. No. 3741, R. A. No. 510, dated June 1, 1929.

“It is further requested that in signing my name to any waiver the date upon which you affix my signature be placed alongside of your own initials.

109 “This authorization is executed in duplicate original. In the lower left-hand corner of one original please write the Commissioner’s name in the same manner in which you affix it to waivers and then sign your full name, your regular business signature, your initials and the date thereof and return the same to this office. Please retain the other original in your office as a part of the permanent files thereof. These documents are the evidence of your authority in the matter.

(Signed)

ROBERT H. LUCAS.”

(2) That the individual authorizations to Revenue Agents in Charge read substantially as follows:

“Until further notice and so long as you hold your present office in the Bureau of Internal Revenue as Internal Revenue — in Charge, you are hereby authorized to sign my name to all assessment waivers which have been or may hereafter be submitted in connection with assessments for any taxable year. In each case, however, your initials should appear immediately under the signature, together with the date of such signing. This authorization as of this date supersedes any and all previous authorizations to sign the name of the Commissioner of Internal Revenue to waivers in connection with assessments for all taxable years.

“As Commissioner of Internal Revenue, I hereby affirm, ratify and adopt, as my own act and deed, all your prior actions in signing the name of the Commissioner of Internal Revenue to assessment waivers under authority of IT-Mimeograph, R. A. No. 388, dated November 4, 1926, and IT-Mimeograph, R. A. No. 445, dated February 28, 1928, as amended by IT-Mimeograph, R. A. No. 510, dated June 1, 1929.

“It is further requested that in signing my name to any waiver the date upon which you affix my signature be placed alongside of your own initials.

“This authorization is executed in duplicate original. In the lower left-hand corner of one original please write the Commissioner’s name in the same manner in which you affix it to waivers and then sign your full name, your
110 regular business signature, your initials and the date thereof and return the same to this office. Please retain the other original in your office as a part of the permanent files thereof. These documents are the evidence of your authority in the matter.

(Signed)

ROBERT H. LUCAS.”

(3) That in the lower left ha-d corner of all authorizations, the party to whom the authority is delegated sign his (or her) full name, regular business signature, initials and date.

(4) That all such authorizations so executed and countersigned, including such authorizations for officers and employees in Washington, be returned to the Commissioner’s

office, where the same shall be filed for future reference and availability for any cause.

(5) That all waivers received by mail in Washington on or after December 26, 1929, be intercepted in the mailing receipt rooms of the Income Tax Unit by some designated person or persons and there taken direct to the proper authorized individual for signature.

(6) That instructions be issued to the Bureau Units in Washington, the Collector's offices, and the offices of the Agents in Charge, that where forms for a specific year are not available and it is considered desirable or necessary to send out a waiver for signature, the complete waiver form should be typed and careful attention should be devoted to the necessity for the dates being clear with no erasures or alterations on the face of the form.

(Signed)

ROBERT H. LUCAS,
Commissioner.

111

RESPONDENT'S EXHIBIT CC.

Filed Oct. 28, 1930.

Docket 28450.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to A&C:Col.

Personal. Duplicate copy.

December 21, 1929.

Hon. Charles W. Anderson,
Collector of Internal Revenue,
250 W. 57 St., New York, N. Y.

MY DEAR MR. ANDERSON:

Until further notice and so long as you hold your present office as Collector of Internal Revenue, you are hereby authorized to sign my name to all assessment and/or collection waivers which have been or may hereafter be submitted in connection with assessments and/or collections for any taxable year. In each case, however, your initials should appear immediately under the signature, together

with the date of such signing. This authorization as of this date supersedes any and all previous authorization to sign the name of the Commissioner of Internal Revenue to waivers in connection with assessments and/or collections for all taxable years.

As Commissioner of Internal Revenue, I hereby affirm, ratify and adopt, as my own act and deed, all your prior actions in signing the name of the Commissioner of Internal Revenue to assessment and/or collection waivers under authority of A&C Mimeograph, Coll. No. 3459, dated August 20, 1926, and IT-Mimeograph, Coll. No. 3606, R. A. No. 445 dated February 28, 1928, as amended by IT-Mimeograph, Coll. No. 3741, R. A. No. 510, dated June 1, 1929.

It is further requested that in signing my name to any waiver the date upon which you affix my signature be placed alongside of your own initials.

This authorization is executed in duplicate original. In the lower left-hand corner of one original please write the Commissioner's name in the same manner in which you affix it to waivers and then sign your full name, your regular business signature, your initials and the date thereof and return the same to this office. Please retain the other original in your office as a part of the permanent files thereof. These documents are the evidence of your authority in the matter.

Sincerely yours,

(Signed)

ROBERT H. LUCAS.

(Signed) ROBERT H. LUCAS, C. W. A.

12/27/29.

CHARLES W. ANDERSON.

SfRr.

112

RESPONDENT'S EXHIBIT DD.

Filed Oct. 28, 1930.

Docket 28450.

(Stamped:) Received Consolidated Returns Audit Division Nov. 30, 1926. ———, Asst. Head of Division.

(Stamped:) Received Dec. 1, 1926, Audit G.

Cable Address: "Fleitmann, New York".

Codes Used: (A. B. C., 4th & 5th Editions, Lieber's.)

IT:CR:G-5. SMC.

Fleitmann & Co., Inc., 356 Fourth Avenue, New York.

Commissioner of Internal Revenue,
Washington, D. C.

DEAR SIR:

Referring to your letter of the 5th inst. and ours of the 9th inst. we beg to enclose herein: Waiver signed by Mr. Frederick T. Fleitmann for the calendar years 1918 to 1921, inclusive.

We wrote you this morning and forwarded to you the waiver signed by Mr. Wm. M. Fleitmann for the calendar years 1918 to 1921 inclusive.

Yours very truly,

FLEITMANN & CO., INC.
(Name not decipherable.)

113 United States Board of Tax Appeals. Filed Mar.
29, 1932.

United States Board of Tax Appeals.

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe for Record.

(Filed — — —.)

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals of the District of Columbia, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entry of all proceedings before the United States Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals as follows:

(a) Amended Petition.

(b) Amended answer to amended petition. Omit Exhibits 1, 2, 3, 4 and 5. Insert statement that they are the same as Respondent's Exhibits A, B, C, D and E, respectively.

114 (3) The findings of fact and opinion of the Board of Tax Appeals.

(4) Stipulation of Tax Liability.

(5) The decision of the Board.

(6) Stipulation for review by the United States Court of Appeals of the District of Columbia.

(7) The petition for review.

(8) The statement of evidence with the following Exhibits:—Respondent's A, B, C, D, E, G, H, I, J, K, L (Include only introductory portion, 1st Paragraph, last 2 Paragraphs and signature), M, N, O, P, Q, R, S, X (Insert following statement: Under date of December 18, 1925, the Commissioner of Internal Revenue by I. T. U. Order No. 83 to the Heads of Divisions, Chiefs of Sections, Supervising Agents and Agents in Charge of Field Divisions and Others Concerned directed among other things: Paragraph XX of Exhibit X), Y (omit waiver form), Z (Introductory portion, page 2 beginning with subdivision on Assessment Waivers, page 4 ending with first line and a half on page 5, and signature), AA, BB, CC, and DD. (In all cases omit certifications.)

(9) This Præcipe.

HOWE P. COCHRAN.

HOWE P. COCHRAN,

Attorney for Petitioner, 920 Potomac Electric Power Company Building, Washington, D. C.

Service of a copy of the foregoing is hereby acknowledged this 29th day of March, 1932.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue,

Attorney for Respondent.

The privilege of filing a counter præcipe is hereby waived.

C. M. CHAREST.

115

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 114, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 12th day of April A. D. 1932.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

116

United States Board of Tax Appeals.

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is ordered that the time for preparation of the evidence and transmission and delivery of the record *sur* petition for review of the above entitled proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended to March 26, 1932.

(Signed)

LOGAN MORRIS,
Member.

Dated Washington, D. C., Jan. 19, 1932.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

117 United States Board of Tax Appeals.

Docket No. 28450.

FREDERICK T. FLEITMANN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is ordered that the time for preparation of the evidence and transmission and delivery of the record *sur* petition for review of the above entitled proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended to April 15, 1932.

(Signed)

LOGAN MORRIS,
Member.

Dated Washington, D. C., March 17, 1932.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 5656. Frederick T. Fleitmann, appellant, vs. David Burnet, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Apr. 13, 1932. Henry W. Hodges, Clerk.

NOV 28 1932

Henry H. Hodges

Court of Appeals of the District of Columbia ^{CLERK}

No. 5656.

FREDERICK T. FLEITMANN,
Petitioner,

against

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

BRIEF FOR PETITIONER.

RICHARD E. DWIGHT,
Attorney for Petitioner.

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Court of Appeals of the District of Columbia

FREDERICK T. FLEITMANN,
Petitioner,
against

DAVID BURNET, COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

No. 5656.

BRIEF FOR PETITIONER.

Statement of the Case.

The petitioner seeks in this Court review of a decision of the United States Board of Tax Appeals entered June 3, 1931, determining a deficiency in his income tax for the year 1918 in the amount of \$20,049.90 (R. 31).^{*} The findings and opinion of the Board of Tax Appeals promulgated April 20, 1931 (R. 21), are reported in 22 B. T. A. 1223.

The case is brought to this Court by a petition for review filed November 27, 1931 (R. 33-38), pursuant to Sections 1001, 1002 and 1003 of the Revenue Act of 1926 (44 Stat. 109-110), as amended by Section 603 of the Revenue Act of 1928 (45 Stat. 873), and a stipulation as to venue (R. 32-33).

^{*} This case, No. 5656, and Cases Nos. 5655 and 5657, were tried together and will be argued together. In the citations of the record in this brief, "R" refers to the record in this case, "R.1" to that in No. 5655, and "R.2" to that in No. 5657. By virtue of stipulations made at the hearing, the evidence in each case may, so far as applicable, be regarded as evidence in the other two (R. 42; R.1 26; R.2 43).

An additional tax in the amount of \$42,702.50 was assessed on March 8, 1924, and on March 21, 1924, a claim for abatement of the entire amount was filed (R. 21, 22, 39, 40, 59). The Commissioner of Internal Revenue, hereinafter called the Commissioner, made a determination upon the claim for abatement allowing it in part and disallowing it in part, and notified the petitioner of his determination in a deficiency letter (R. 11-12, 23) which was mailed on March 14, 1927 (R. 39). The petitioner thereupon instituted this proceeding in the Board of Tax Appeals to contest the correctness of the determination of deficiency (R. 4-11).

The only question presented to this Court is whether the statute of limitations barred the collection of the deficiency.

The return was filed on March 13, 1919 (R. 39) and therefore the period of limitation upon collection of the deficiency expired on March 13, 1924, unless it was extended by waivers (Revenue Act of 1921, §250 (d)).

The respondent relies upon the following waivers:

(1) Assessment and collection waiver dated February 18, 1924, expiring February 18, 1925, not signed by or on behalf of the Commission (R. 21-22, 62-63).

(2) Assessment waiver dated February 18, 1926, expiring December 31, 1926, signed with the name of the Commissioner by a Miss Mead (R. 39, 42) as follows: "D. H. Blair, Commissioner, H. B. R." (R. 22, 54-55).

(3) Assessment waiver dated November 18, 1926, expiring December 31, 1927, signed with the name of the Commissioner by a Miss Van Amburg (R. 39, 42) as follows: "D. H. Blair, Commissioner, H. B. R." (R. 22, 55-56).

(4) Collection waiver dated December 15, 1927, expiring December 31, 1928, signed with the name of the Commissioner by a Mr. Shea (R. 39, 49) as follows: "D. H. Blair, Commissioner of Internal Revenue, by Chas. W. Anderson, Collector of Internal Revenue, Third District of New York" (R. 23, 56).

(5) Collection waiver dated October 17, 1928, expiring December 31, 1929, signed with the name of the Commissioner by Mr. Shea (R. 39-40, 49) in the same manner as the preceding waiver (R. 23, 57).

(6) Collection waiver dated September 27, 1929, expiring December 31, 1930, signed with the name of the Commissioner by a Mr. O'Brien (R. 40, 49) as follows: "Robert H. Lucas, Commissioner of Internal Revenue, by Chas. W. Anderson, Collector of Internal Revenue" (R. 23, 59).

The respective Commissioners whose names were signed to these waivers could not testify that they had ever seen any of them before the trial (R. 40, 41, 42). There is no direct testimony with respect to the circumstances attending the actual signing of any of these waivers. The evidence relied upon by the respondent to show these circumstances is entirely evidence of custom.

Miss Mead and Miss Van Amburg, who respectively signed the Commissioner's name to the waivers of February 18, 1926, and November 18, 1926, were secretaries to Henry B. Robinson (R. 50; R.² 34, 40) whose initials appear on the waivers (R. 47, 55, 56; R.² 33, 34). Mr. Robinson was head of a division of the Bureau of Internal Revenue and the waivers were signed in his division (R. 22; R.² 33).

At the times when these waivers were signed, there was in force an order of the Commissioner which was in part as follows:

“Any waiver received from a taxpayer shall be referred to the head of division in which the case is under consideration, who will determine whether it is acceptable” (R. 22, 74).

Mr. Robinson had written authority from the Commissioner as follows:

“Until further notice, you are hereby authorized to sign my name to all waivers which have been or may hereafter be submitted in connection with assessments for 1922 and prior years. In each case, however, your initials should appear immediately under this signature * * * ” (R. 22; R.² 38, 44).

Mr. Robinson's secretaries had no authority from the Commissioner to sign waivers (R. 51; R.² 33, 41). Mr. Robinson testified that he was the only one in his division with the initials “H.B.R.” who had authority from the Commissioner to sign waivers (R.² 33). He also testified:

“Eight men in my division are now authorized to sign waivers. The number of waivers was so great that it was necessary to have additional men.”

* * * * *

“The additional men were authorized to sign waivers in the latter part of 1927 or early part of 1928. They were authorized directly by the Commissioner” (R. 47).

Commissioner Blair testified:

“I delegated authority for signing to all of the heads of division, all the collectors of internal rev-

enue, all of the agents in charge and perhaps some others. The delegation of authority to the persons named was essential to the conduct of the Government's business. I delegated such authority to as many people as I thought advisable. I suppose I could have delegated it to everybody, but whenever it was necessary and it was suggested to me that I designate such and such a person, I did it. Those so delegated were principally men in responsible positions. It was an important matter and I took care to whom I delegated it" (R.² 40).

Mr. Robinson testified that he adopted and approved the signing of the waivers by his secretaries (R.² 35) although he also testified that he did not recall having seen the waivers involved in this case before the day of the hearing (R. 42, 44-45; R.² 37).

Miss Mead, who signed the waiver of February 18, 1926, did not testify. Miss Van Amburg, who signed the waiver of November 18, 1926, testified that she had no recollection of the circumstances under which she signed the waiver (R.² 41).

The custom in Mr. Robinson's office with reference to the signing of waivers is described in his testimony as follows:

"Q. Mr. Robinson, will you outline briefly the custom and routine with reference to waivers during the period involved in this case, and these particular waivers I refer to are dated February 18, 1926, and November 18, 1926? A. Waivers coming in which were in great number were all brought to me for the purpose of seeing whether they met the requirements of the Bureau, and for the necessary signatures to record their acceptance.

"Q. State whether or not you issued instructions to those in your office or under your supervision, with reference to whether or not waivers should be brought to your desk. A. I issued instructions that they be brought to my desk.

“The instructions were not in writing. So far as I know they were never disregarded. As a rule the waivers were signed at my desk. My desk was a large double desk and the person signing waivers sat opposite me at the desk.

“By Mr. Low:

“Q. State what authorization you did give those people who signed waivers for you? A. I merely directed for them to affix the name my initials for me, and that was only in those instances where the number of waivers were so great the necessity for having expeditious action on them was apparent.”

* * * * *

“Q. In stating the waivers were brought to your desk, as I understood your testimony, for the purpose of determining whether or not they should be accepted, who exercised that function? A. I did” (R. 44-45).

* * * * *

“My recollection is that I saw all the waivers that came into my division. They came to my office and almost always came to my desk as I recall” (R.² 39).

Miss Van Amburg signed waivers at Mr. Robinson's desk (R. 51), but Miss Mead signed some of them at Mr. Robinson's desk and some at her desk in an adjoining room (R.² 41, 42).

The only written authority to sign waivers on behalf of the Commissioner which Collector Anderson had at the time when the waivers of December 15, 1927, October 17, 1928, and September 27, 1929, were signed was contained in A. & C. Mimeograph, Coll. No. 3459, dated August 20, 1926 (R. 23, 74-77), and IT—Mimeograph, Coll. No. 3606, dated February 28, 1928 (R. 23, 77-80).

The material portion of the first mimeograph is as follows:

“It will be noted that the law requires that the waivers should be signed by the Commissioner and the taxpayer, or, in the case of estate or gift tax, the executor. In order to obviate the necessity of sending collection waivers to Washington for the signature of the Commissioner, authority is hereby delegated to Collectors of Internal Revenue to sign such waivers in the name of the Commissioner as follows:

D. H. BLAIR,
Commissioner of Internal Revenue,

By.....,
Collector of Internal Revenue” (R. 76).

The second mimeograph contains a paragraph practically identical with the foregoing paragraph.

Mr. Shea, who signed the waivers of December 15, 1927, and October 17, 1928, had no authority from the Commissioner to sign waivers (R. 50), and there is no evidence that Mr. O'Brien, who signed the waiver of September 27, 1929, had any such authority.

The only evidence of the circumstances under which these waivers were signed was the testimony of Mr. Shea. With respect to the custom in Collector Anderson's office in connection with the signing of waivers, he testified as follows:

“I am familiar with the custom and routine in the Collector's office. Waivers are usually brought up to the front office to my desk along with other important mail and all matters of that character are carried in to the Collector for his scrutiny, generally by me in person or by a stenographer. The Collector usually goes over them to ascertain

whether or not they are properly executed. He directed me to sign them."

* * * * *

"Of my own knowledge I would say that that was the procedure we religiously followed * * * "

* * * * *

"Yes, we usually followed the proper practice in this sort of thing" (R. 49, 50).

With respect to Mr. O'Brien's act in signing the waiver of September 27, 1929, he testified that Mr. O'Brien would not deviate from the custom and that in all probability he proceeded in the usual way by taking the waiver to the Collector, but admitted that he did not know whether or not Mr. O'Brien had done so in this instance (R. 49, 50).

In a letter to Collector Anderson dated December 31, 1929, Commissioner Lucas purported to ratify and adopt all of the Collector's prior actions in signing the name of the Commissioner to waivers under the authority previously given him (R. 23, 84-85). There is no evidence of any ratification by the Commissioner of the actions of Mr. Robinson in connection with the signing of waivers.

The waivers of February 18, 1924, February 18, 1926, and November 18, 1926, were executed by the petitioner in response to written requests from the office of the Commissioner (R. 21-22, 60-64). The letter requesting the first waiver was signed by a Deputy Commissioner (R. 64). Each of the letters requesting the latter two waivers was signed by a Chief of Section for an Assistant to the Commissioner, and contained the following language:

"An examination of your case indicates that the period of limitations prescribed by law or as extended by a waiver now on file, will presently expire and bar any additional assessment against you

for the calendar year(s) 1918 to 1921, inclusive, unless you consent to extend further the period of limitation. It is desired to give you an opportunity to present any evidence or contentions relative to the determination of your correct tax liability, but the Bureau will be obliged to protect the interests of the Government by notifying you of its final determination of any deficiency unless you furnish waivers in proper form.

“It is, therefore, suggested that you execute and return to this office within ten days from the date of this letter the enclosed forms of waiver * * * ” (R. 60-62).

The waivers of December 15, 1927, October 17, 1928, and September 27, 1929, were executed by the petitioner in response to written requests purporting to be signed by Collector Anderson (R. 23, 58, 67-68). The letter from the Collector dated November 5, 1928, in response to which the waiver of October 17, 1928, was filed (R. 58), was to the following effect:

“There is attached waiver covering outstanding tax of \$42,702.50 for the year 1918. Waiver covering this account, which was signed by you, expires on December 31st, 1928. Inasmuch as it appears that this account is still pending before the United States Board of Tax Appeals it is requested that the enclosed forms be signed and returned to this office as soon as possible” (R. 67).

For the convenience of the Court the dates and certain other facts relating to the applicability of the statute of limitations are summarized below:

Return filed—3/13/19.
 Additional tax assessed—3/8/24.
 Five year period ended—3/13/24.
 Deficiency letter mailed—3/14/27.

WAIVERS.

	<i>Date of Waiver</i>	<i>Date of Expiration</i>	<i>Person Signing Commissioner's Name</i>
(1)	2/18/24	2/18/25	Not signed
(2)	2/18/26	12/31/26	Miss Mead
(3)	11/18/26	12/31/27	Miss Van Amburg
(4)	12/15/27	12/31/28	Mr. Shea
(5)	10/17/28	12/31/29	Mr. Shea
(6)	9/27/29	12/31/30	Mr. O'Brien

The statutes involved in this case are set forth in an appendix to this brief.

Assignments of Error.

The assignments of error set forth in the petition for review (R. 35-37) which are relied upon by the petitioner may be summarized as follows:

1. The Board erred in entering judgment for the Commissioner.
2. The Board erred in approving and redetermining the deficiency found by the Commissioner.
3. The Board erred in failing to find that the collection of all further taxes from the petitioner for the year 1918 was barred by the statute of limitations.
4. The Board erred in failing to hold that under the evidence the burden of proof was on the respondent to prove that the statutory period of limitations had been extended by valid waivers.

5. The Board erred in failing to hold that there were no sufficient consents in writing which would validate the collection of this tax.

6. The Board erred in failing to find that the waivers relied upon by the Government were invalid and void.

7. The Board erred in holding that "when the correspondence between the parties shows that they understood the statute to be extended there is a sufficient consent in writing."

8. The Board erred in holding that the consents in writing were complete when the petitioner signed and filed the waiver forms.

9. The Board erred in holding that the signing of a waiver comprised two elements: first, the discretionary duty of approval which could not be delegated by an agent, and, second, the ministerial duty of signing the name of the Commissioner which could be delegated by an agent.

10. The Board erred in holding that the signing of the Commissioner's name to a waiver was a ministerial act.

11. The Board erred in holding that the duty of signing the Commissioner's name to a waiver could be delegated by an agent.

12. The Board erred in holding that under their authorization Robinson and Anderson could redelegate to subordinates the duty of signing the Commissioner's name to waivers.

13. The Board erred in holding that the attempted redelegation to subordinates by Robinson and Anderson of the duty of signing the Commissioner's name to these waivers was a valid redelegation.

14. The Board erred in holding that the evidence showed that there was no attempt on the part of Robinson and Anderson to redelegate the duty of passing upon the acceptability of waivers.

15. The Board erred in holding that the evidence showed that said duty "was personally performed by Robinson and Anderson by having the waivers presented to them for decision as to their acceptability."

16. The Board erred in holding that the evidence established that "it was the practice in both Robinson's and Anderson's offices for waivers to be brought to the attention of Robinson and Anderson and when they determined the waivers should be signed, the physical act of signing was delegated to employees."

17. The Board erred in holding with respect to these waivers that the evidence showed "in each instance a waiver was requested by the respondent and it was pursuant to these requests that the waivers were signed and sent in by the petitioner."

18. The findings of the Board that the waivers in question were furnished in response to letters from the respondent requesting same are not supported by the evidence.

19. The findings of the Board with respect to the waiver dated September 27, 1929, that "the Collector's name was signed by a deputy collector at the direction of the Collector," are not supported by the evidence.

ARGUMENT.

I.

Collection of the deficiency is barred because all of the waivers are invalid for want of proper signature on behalf of the Commissioner.

Section 250 (d) of the Revenue Act of 1921 provides that the amount of the tax for any prior year "shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." Since the return was filed on March 13, 1919 (R. 39), the five-year period of limitation expired on March 13, 1924. The deficiency was assessed within this period. Section 278 (d) of the Revenue Acts of 1924 provided a six-year period of limitation after assessment for collection, but this section has been held by the Supreme Court not to apply to taxes assessed, as was this deficiency, prior to June 2, 1924. *Russell v. United States*, 278 U. S. 181. Therefore collection of the deficiency was barred on March 13, 1924, unless the right of collection has been preserved by waivers.

Each of the revenue acts which apply to any of the waivers in this case provides for the extension of the period of limitation by the consent in writing of "both the Commissioner and the taxpayer." Revenue Act of 1921, §250 (d); Revenue Act of 1924, §278 (c); Revenue Act of 1926, §278 (c) (d).

It would seem to be axiomatic that the consent in writing of the taxpayer without the consent in writing of the Commissioner is insufficient to extend the period.

But the Circuit Court of Appeals for the Ninth Circuit has held that the consent of the taxpayer alone is sufficient. *Commissioner v. Hind*, 52 F. (2d) 1075. As this decision challenges one of the basic premises of the petitioner's argument, we shall show, *in limine*, that it is unsound.

The Court relied principally upon statements of the Supreme Court in *Florsheim Bros. Drygoods Co., Ltd., v. United States*, 280 U. S. 453; *Stange v. United States*, 282 U. S. 270; *Aiken v. Burnet*, 282 U. S. 277, and *Burnet v. Chicago Railway Equipment Co.*, 282 U. S. 295, to the effect that the Commissioner's signature to the waiver was required for "administrative" purposes only, and statements in textbooks to the effect that in general statutes directing the mode of proceeding by public officers are deemed directory merely, and not mandatory, and strict compliance with them is not indispensable to the validity of the proceedings.

These premises do not support the Court's decision. The Supreme Court did not, in the cases cited above, indicate that a waiver is valid without the Commissioner's signature. On the contrary, its opinions show clearly by frequent reference to the "requirement" of the Commissioner's signature, that the Supreme Court assumes such signature to be a *sine qua non* of a valid waiver. See *Florsheim Brothers Drygoods Co. v. United States*, *supra*, p. 466; *Stange v. United States*, *supra*, p. 276; *Aiken v. Burnet*, *supra*, p. 281; *Burnet v. Chicago Railway Equipment Co.*, *supra*, p. 298. The rule to the effect that the validity of proceedings by public officers is not necessarily dependent upon strict compliance with a statute prescribing the mode of proceeding has no bearing upon the validity of a waiver. The statute relating to waivers is not one prescribing a mode of official proceeding. It is a statute creating a bar to collection which

shall become effective upon a certain date unless both the Commissioner and the taxpayer shall consent to a later date. We find it difficult to imagine how Congress could have said more plainly that nothing but the consent in writing of both the Commissioner and the taxpayer shall prevent the statutory bar from becoming effective.

We submit that the statutory requirement of the Commissioner's signature cannot be construed as directory rather than mandatory. Speaking of this requirement only a short time before the decision of *Commissioner v. Hind*, the Circuit Court of Appeals for the Second Circuit had said in *Onondaga Co. v. Commissioner*, 50 F. (2d) 397, 399:

“The Courts have not said that a signature is unnecessary or that it is merely directory, not mandatory.”

If the statutory provision specifying the form of the consent necessary to extend the period of limitation were directory rather than mandatory, the statutory provision specifying the form of the compromise agreement necessary to finally determine tax liability, which is similarly administrative in purpose, would seem to be equally directory. The Supreme Court has held, however, that the latter provision, contained in Section 3229 of the Revised Statutes (U. S. C., Tit. 26, §158), is mandatory and a compromise agreement not made in the prescribed manner is invalid. *Botany Worsted Mills v. United States*, 278 U. S. 282. The statute provided as follows:

“The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the

advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, * * * with his reasons therefor, with a statement of the amount of tax assessed, * * * and the amount actually paid in accordance with the terms of the compromise.”

The compromise agreement was made without the advice and consent of the Secretary of the Treasury, and no opinion of the Solicitor of Internal Revenue was filed. The Supreme Court said, at pages 288-289:

“We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner’s office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. *When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Raleigh, etc. R. R. Co. v. Reid*, 13 Wall. 269, 270; *Scott v. Ford*, 52 Ore. 288, 296.

“It is plain that no compromise is authorized by this statute which is not assented to by the Secretary of the Treasury. *Leach v. Nichols* (C. C. A.), 23 F. (2d) 275, 277. For this reason, if for no other, the informal agreement made in this case did not constitute a settlement which in itself was binding upon the Government or the Mills.” (Italics ours.)

Other cases decided by the Supreme Court of the United States show that when Congress requires an official signature to a document, the requirement is mandatory rather than directory and without it the document is invalid. In *McGarrahan v. Mining Co.*, 96 U. S. 316, a statute required that land patents be signed in the name of the President, either by himself or by his duly appointed secretary, sealed with the seal of the General Land Office and countersigned by the recorder and the Court held that a land patent was invalid without the recorder's signature. In *Marsh v. Nichols*, 128 U. S. 605, a statute required that letters patent be issued under the seal of the Patent Office, and signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, and the Court held that letters patent were not valid without the signature of the Secretary of the Interior. The statutory requirement of the signature of the recorder to land patents and that of the signature of the Secretary of the Interior to letters patent were also apparently for "administrative" purposes only. Yet this fact did not prevent the Court from holding them mandatory.

The necessity of the Commissioner's signature for the validity of a waiver was affirmed by this Court in *Joy Floral Co. v. Commissioner*, 58 App. D. C. 277, 29 F. (2d) 865, 867, as follows:

"Furthermore, section 278 (c), *supra*, provides that the written consent for a later assessment shall not be operative, unless signed by the Commissioner as well as by the taxpayer."

Furthermore, it has been the basic assumption underlying numerous recent decisions on waiver questions, including the decision of this Court in *L. J. Christopher Co. v. Commissioner*, 60 App. D. C. 368, 55 F. (2d) 530,

holding that a waiver is valid if signed for the Commissioner by someone else under his direction and the decisions of the Circuit Court of Appeals for the Second Circuit in *Onondaga Co. v. Commissioner, supra*, holding that in the absence of evidence to the contrary the Commissioner's signature apparently affixed by someone connected with the Department of Internal Revenue will be presumed to have been properly affixed, and in *Greylock Mills v. Commissioner*, 31 F. (2d) 655, holding that a waiver is valid if signed by the Commissioner at any time prior to the expiration of the statutory period unless previously withdrawn by notice to the Commissioner.

A short passage in the opinion of *John M. Parker Co. v. Commissioner*, 49 F. (2d) 254 (C. C. A., 5th Circ.), would seem literally to indicate that the decision in that case is in accord with that in *Commissioner v. Hind, supra*. The Court said, at page 256:

"It is contended that the waiver of the statutory period was invalid because it was not shown that it was signed by the Commissioner. But that contention is without merit."

The record in the case shows, however, that the waiver in question bore what purported to be the Commissioner's signature. Apparently the Court held merely that the Commissioner did not have the burden of proving that this signature was properly affixed to the waiver. Cf. *Onondaga Company v. Commissioner, supra*.

The only cases which we have been able to find, other than *Commissioner v. Hind*, squarely deciding the question whether a waiver lacking a signature on behalf of the Commissioner is valid are a line of cases in the Board of Tax Appeals uniformly holding such a waiver invalid. The question received exhaustive treatment in a clear and forceful majority opinion written by Mr. Trammell in *Corn Products Refining Co. v. Commis-*

sioner, 22 B. T. A. 605, portions of which are set forth in the footnote.*

* "Clearly the Court in the *Florsheim* case did not hold that it was not necessary for the Commissioner to sign consents in writing as specifically required by the statute, and the *Stange* and *Aiken* cases merely relied on that case and did not in any way modify it. While the requirement as to the Commissioner's signature was for administrative reasons, still it was a statutory requirement and is not to be ignored. Many of the provisions of the revenue acts are for administrative purposes. If a thing is required for administrative reasons we are not warranted in saying that it is not required at all (p. 622).

* * * * *

"We know of no rule of statutory construction to the effect that because an act *required* by statute is for administrative purposes it is not *required* at all. The real question is whether the statute is directory or mandatory, not whether it is administrative or not. The fact that the requirement of the Commissioner's signature is for administrative purposes has no relation whatever as to whether it is mandatory or directory. When a particular provision of a statute relates to some immaterial matter as to which compliance with the statute is a matter of convenience rather than substance, it may be said to be directory only and not mandatory, but in the case of waivers, while the Commissioner's signature is required for administrative purposes, there is nothing to indicate that it was not a material matter and that Congress intended that the provision should be complied with to the same extent that the approval of the Secretary was required in the case of compromises. This is indicated by the language of the *Florsheim* case, where the Court discussed the reasons for the *requirement*.

"We think that Congress intended to require the signature of both the Commissioner and the taxpayer in the case of waivers. The language of the 1924, 1926, and 1928 Acts refers to consents in writing of 'both' the Commissioner and the taxpayer. Congress must have recognized that prior to the 1921 Act, when provision was first made for the extension of time for the assessment and collection of taxes by consents in writing of the Commissioner and the taxpayer, the Commissioner could legally accept waivers signed only by the taxpayer; that the Commissioner had, as a matter of practice, been accepting such waivers signed by the taxpayer under all of the income tax acts previous to the 1921 Act. See S. O. 60, C. B. 3, p. 295, as to waivers under Acts 1909 to 1913; articles 38, 50, and 230 of Regulations 33, Revised, under the 1916 Act and that act as amended and O. D. 234, C. B. 1, p. 252, as to waivers under the 1918 Act. Waivers signed by taxpayers previous to the 1921 Act were perfectly good as common law waivers, as said by the Supreme Court in the *Stange* case, *supra*. At common law waivers were not required to be signed by both the Commissioner and the taxpayer, but they were recognized as good and effective. The Revenue Act of 1921, section 250 (d), changed the common law rule on the subject of waivers to require the consent in writing of both the Commissioner and the taxpayer, and this provision has been continued in all subsequent acts. If Congress had intended that it was not necessary for both the Commissioner and the taxpayer to sign waivers, the question arises as to why the provision was put in the statute when before that time they were good when signed only by the taxpayer. After all is said on the question of whether a statutory provision is directory or mandatory, the true test is the intention of the legislature. See *Marx v. Hawthorn*, 148 U. S. 172; *Lyon v. Alley*, 130 U. S. 177 (pp. 624-625)."

We submit that the decision in *Commissioner v. Hind* is erroneous, and that a waiver is not valid without the written consent of the Commissioner. We submit further that, as we shall now proceed to show, none of the waivers involved in this case contains such consent.

None of the waivers was signed by the Commissioner himself. The first waiver, dated February 18, 1924, bears no signature on behalf of the Commissioner (R. 62-63). The Commissioner's name was signed to the second waiver, dated February 18, 1926, and the third waiver, dated November 18, 1926, by secretaries of Henry B. Robinson, a head of a division in the Bureau of Internal Revenue (R. 22). The Commissioner's name was signed to the fourth waiver, dated December 15, 1927, the fifth waiver, dated October 17, 1928, and the sixth waiver, dated September 27, 1929, by employees in the office of Collector Anderson (R. 23).

Mr. Robinson and Collector Anderson each had written authority from the Commissioner to sign his name to waivers (R. 22, 23). The persons who did sign the Commissioner's name to the waivers, however, had no authority from him to do so (R. 50, 51; R.² 33, 41). The existence of evidence to this effect rebuts any presumption which might otherwise exist of the proper signing of the waivers on behalf of the Commissioner. Cf. *Onondaga Co. v. Commissioner*, *supra*.

The Board of Tax Appeals held that the duties of Mr. Robinson and Collector Anderson with respect to the signing of waivers were discretionary in so far as they required approval of the waivers and ministerial in so far as they required physical signature of them, that the discretionary part of these duties was performed by Mr. Robinson or Collector Anderson in each instance and the ministerial part was delegated to the persons who signed the waivers, that such delegation of duties

was proper and that therefore the waivers were properly signed on behalf of the Commissioner (R. 26-27).

We admit the general rule of the law of agency upon which the Board of Tax Appeals relies, which is to the effect that while discretionary duties may not be delegated, ministerial duties may be, but we submit that the rule does not apply to the signing of waivers because the statutes require that they be signed by the Commissioner and they can be validly signed by others only pursuant to express or implied statutory authority which the persons who signed the waivers involved in this case did not possess.

That the question in this case is not whether Mr. Robinson or Collector Anderson could delegate their authority to sign waivers, but whether the persons who did sign the waivers had statutory authority to sign them, is shown by an analogous case decided by this Court. *United States ex rel. Stapleton v. Duell*, 17 App. D. C. 575. In that case this Court held that the Assistant Commissioner of Patents had authority to hear and decide an appeal pending in the Patent Office which had been assigned to him by the Commissioner of Patents. The statute under which the appeal was taken provided for an appeal to the Commissioner of Patents. In this respect it was quite analogous to the statutes involved here, which require that waivers be signed by the Commissioner of Internal Revenue. This Court said that the only question that needed to be decided was "whether the Commissioner of Patents has authority, under the law, to assign to the Assistant Commissioner the performance of such duty as that of hearing and deciding an appeal" (p. 577), and it found that he had such authority under the statutes. In that case, as here, an attempt was made to show that the common law rule relating to delegation of powers by an agent was appli-

cable. The relator made the argument that the assignment by the Commissioner to the Assistant Commissioner of the duty to hear and decide the appeal was a delegation of a duty which could not be delegated. The portion of this Court's opinion which answers that argument shows clearly that the determination of a case of the sort involved there, and here, depends not upon whether an agent has delegated his powers in accordance with common law rules of agency, but whether when statutes require that an act be done by a specified person, the doing of that act by some other person is expressly or impliedly authorized by statute. The Court said, at pages 583-584:

“It is urged in argument that such an assignment of duty is a delegation of judicial power that belongs to and can only be performed by the Commissioner in person. But we are not of that opinion. *The whole matter rests within the power of Congress, and it was just as competent to invest the Assistant Commissioner with appellate power as it was to invest the Commissioner with such power.* It was no more the delegation of judicial power than was the case of the appointment of arbitrators by the Secretary of State under the act of 1793, or the appointment of the board of examiners of appeals by the Secretary of State under the act of 1836. *In each case the source of the power was and is in Congress, and the method devised was only the means to accomplish the object in view. When the duty is assigned, the power to execute it is not derived from the Commissioner, but from the act of Congress authorizing such assignment of duty to the Assistant Commissioner. So soon as the duty is assigned to the Assistant, the act of Congress at once invests him with power and authority to perform it.*

“He does not perform it as the act of the Commissioner, but as the act of the Assistant Commissioner.” (Italics ours.)

The case of *Marsh v. Nichols, supra*, shows that when an Act of Congress requires a signature by a specified officer, the signature by another officer is not valid unless authorized by statute. Although the statute involved in that case required the signature of the Secretary of the Interior to letters patent, the signature of the Assistant Secretary of Interior to letters patent was held valid, but this was only because of another statute under which the Assistant Secretary had authority to act for the Secretary in his absence. And in *McGarrahan v. Mining Co., supra*, the Supreme Court said, at page 321:

“The President may sign by his secretary, but the recorder must sign himself.”

The theory of the Board of Tax Appeals to the effect that where a statute requires the signature of one person a signature by another person can be sustained under common law rules of agency is inconsistent not only with the above decisions, but also with the doctrine enunciated at any early date by the Supreme Court to the effect that the powers of Government officers and employees are derived only from statute. In *The Floyd Acceptances*, 7 Wall. 666, where it was held that drafts upon the United States accepted by the Secretary of War were invalid, the Supreme Court said, at pages 676-677:

“Whenever negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government.

“When this inquiry arises, where are we to look for the authority of the officer?

“*The answer, which at once suggests itself to one familiar with the structure of our government,*

in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law. It would seem reasonable, then, that on the question of the authority of the Secretary of War to accept bills of exchange, we must look mainly to the acts of Congress." (Italics ours.)

The above cases show that if the Commissioner's name is signed to a waiver by some person other than the Commissioner the waiver is invalid, irrespective of any delegation of authority, unless that person had express or implied statutory authority to sign waivers, or had delegated authority delegated to him pursuant to express or implied statutory provision. The persons who signed the Commissioner's name to the waivers in this case had neither express nor implied statutory authority to do so. Mr. Robinson and Collector Anderson may be assumed to have had such implied statutory authority by reason of the fact that because of the volume of work it was necessary for the Commissioner to designate other officials to sign his name to waivers (R.² 40), and his action in doing this may be supposed to have the implied sanction of Congress. See *United States ex rel. Stapleton v. Duell*, *supra*, p. 584; *United States v. Birdsall*, 233 U. S. 223, 230-231. But the prac-

tice in the offices of Mr. Robinson and Collector Anderson of re-delegating the authority to sign waivers certainly cannot be supposed to have the implied sanction of Congress. There was no necessity for re-delegation which could give rise to any such implication. Commissioner Blair's testimony shows that he delegated authority to sign waivers whenever it was suggested to him that it was necessary to do so (R.² 40) and Mr. Robinson's testimony shows that at the time of the trial eight men in his division had authority from the Commissioner to sign waivers (R. 47).

Even if, as the Board of Tax Appeals assumes, the common law rule that ministerial duties can be delegated applied to statutory duties and the duty to sign waivers were ministerial, nevertheless Mr. Robinson and Collector Anderson were without power to delegate such duty. The common law rule is based upon the theory that the principal impliedly authorizes the delegation of duties not involving discretion. See 1 Mechem, Agency, 2 ed., §306. If under the circumstances of any particular case such authority cannot be implied, the rule is not applicable. No implied authority to delegate the duty of signing waivers can be implied from the express authority given by the Commissioner to Mr. Robinson and Collector Anderson, but on the contrary this express authority clearly contemplates that it be exercised by the recipient alone. The Commissioner gave Mr. Robinson written authority as follows:

“You are hereby authorized to sign my name to all waivers * * *”

and also expressly instructed him as follows:

“In each case, however, your initials should appear immediately under this signature” (R.² 44).

The Commissioner gave written authority to Collector Anderson as follows:

“It will be noted that the law requires that the waivers should be signed by the Commissioner and the taxpayer, or, in the case of estate or gift tax, the executor. In order to obviate the necessity of sending collection waivers to Washington for the signature of the Commissioner, authority is hereby delegated to Collectors of Internal Revenue to sign such waivers in the name of the Commissioner as follows:

D. H. BLAIR,
Commissioner of Internal Revenue,

By _____,
Collector of Internal Revenue.” (R. 76.)

It cannot be seriously doubted that the Commissioner intended the recipients of such authority to sign waivers personally. Therefore only those persons could properly sign waivers.

The respondent has made some effort to show that the signing of the Commissioner's name to some of the waivers was validated by ratification. The letter of Commissioner Lucas purporting to ratify the signing of waivers by Collector Anderson (R. 84-85) could not possibly apply to any of the waivers except the sixth for only that one was signed with his name. That waiver, as we shall show in Point III, is not material to the determination of this case. Furthermore, we submit that this blanket ratification does not apply even to the sixth waiver because it purports to ratify only signatures by Collector Anderson and the Collector did not sign that waiver. Although Mr. Robinson admitted at the trial that he did not recall having seen the waivers involved

in this case before the day of the hearing (R. 42, 44-45, R.² 37), he nevertheless testified that he adopted and approved the signing of the waivers by his secretaries (R.² 35). This evidence merely shows an attempt on the part of Mr. Robinson to validate the waivers at the trial. Even if such action could be called ratification, we submit that it is immaterial because it could not be more effective than the original authority given by Mr. Robinson, which, as we have shown, was nugatory.

The Board of Tax Appeals' holding to the effect that the waivers were approved by Mr. Robinson or Collector Anderson and that the persons who signed the waivers merely performed the mechanical and physical act of affixing the Commissioner's name to them is not supported by the evidence. The evidence relied upon by the respondent to show the circumstances under which the waivers were signed is entirely evidence of custom.

The evidence of custom in Mr. Robinson's office was substantially to the following effect: There were standing oral instructions issued by Mr. Robinson to the effect that waivers be brought to his desk "for the purpose of seeing whether they met the requirements of the Bureau, and for the necessary signatures to record their acceptance" (R. 44). Mr. Robinson testified that he exercised the function of determining whether or not the waivers brought to his desk should be accepted (R. 45). In some instances where the number of waivers was great, he had them signed by his secretaries (R. 44). Sometimes the waivers were signed at Mr. Robinson's desk and sometimes at the desk of his secretary in an adjoining room (R. 51; R.² 41, 42).

There was no evidence to show that the custom, if any existed, was followed when any of the waivers involved in this case were signed and the testimony fails to justify the inference that the custom was uniformly followed. Mr. Robinson's testimony does not show that

his instructions that waivers be brought to his desk were uniformly followed. On the contrary, his testimony permits the inference that sometimes waivers were signed in his division without ever having come to his attention, for he testifies: "They came to my office and *almost always* came to my desk as I recall" (R.² 39). (*Italics ours.*)

The only evidence of any custom in Collector Anderson's office was the testimony of Mr. Shea, an employee, and he testified that waivers were "usually" brought to his desk and carried to the Collector "for his scrutiny," "generally" by Mr. Shea "or by a stenographer," that the Collector "usually" went over them to ascertain whether or not they were properly executed, that the Collector directed Mr. Shea to sign them and that the people in Collector Anderson's office "usually followed the proper practice in this sort of thing" (R. 49, 50).

There is no evidence showing that the custom, if any existed, was followed in the signing of any of the waivers involved in this case and the frequent use of the qualifying word "usually" in Mr. Shea's testimony shows that this evidence does not justify the inference that there was any real custom or the inference that such custom as the respondent relies upon was uniformly followed.

At best the evidence of custom merely shows that waivers were "usually" handled in the manner described by the witnesses. We submit that it is utterly inadequate to show that the waivers in this case were approved by either Mr. Robinson or Collector Anderson, and therefore fails to sustain the respondent's burden of proof or the holding of the Board of Tax Appeals.

The evidence clearly does not justify holding a signature pursuant to the delegated authority merely an act of an amanuensis. Without conceding that it would

be possible in any case for Mr. Robinson or Collector Anderson properly to sign waivers by amanuensis, we submit that it is clearly impossible to sustain any of the waivers involved in this case on this ground without at least a specific showing that it was signed in the presence of and at the specific direction of Mr. Robinson or Collector Anderson. The record shows no evidence of this character with respect to any of the waivers.

Even if Mr. Robinson or Collector Anderson had approved of each waiver before it was signed, we submit that the attempt on their part to delegate to others the authority given them by the Commissioner to affix his signature did not confer authority to execute valid waivers because, as we have already shown, the act of signing waivers pursuant to the delegated authority, however mechanical or ministerial, would still be improper for want of statutory sanction as well as the authority of the Commissioner.

Not only is there an absence of any statutory authority for re-delegation of authority given by the Commissioner to sign his name to waivers, but it seems clear that the statutes which require the Commissioner's signature to waivers contemplate that the signature shall be affixed only by the Commissioner or someone authorized by him. The purpose of the statutory requirement of the Commissioner's signature is explained by the Supreme Court in *Florsheim Brothers Drygoods Co., Ltd. v. United States*, 280 U. S. 453, at pages 466-467, as follows:

“If a reason must be found, it exists in the general desirability of the requirement as an administrative matter. It serves to keep the Commissioner in closer touch with the matters which he is charged to administer. It avoids claims of improvident execution of waivers and unauthor-

ized exactions by subordinates of the Department for the purpose of curing their own delinquencies. And it provides a formal procedure which is generally desirable * * *,”

If the practice with respect to the signing of waivers which the respondent defends in this case were permitted, this purpose would clearly be defeated. This was the view of Mr. Trammell of the Board of Tax Appeals who, referring in his dissenting opinion to the language quoted above, said:

“If subordinates in the Department, without authority from the Commissioner, approve waivers, the very purpose of the requirement of the statute would be overthrown. The Commissioner would not be kept in close touch with the matters he is charged to administer. Improvident execution of waivers by subordinates of the Department would not be obviated. I think, therefore, that the Commissioner’s name placed on the waivers by Robinson’s secretary was unauthorized and did not constitute the consent of the Commissioner in writing” (R. 29).

The purpose of Congress can be accomplished only by a method which gives assurance that each waiver that is signed has the approval of the Commissioner or one of the responsible subordinates to whom he has intrusted the important task of passing upon the acceptability of waivers. No such assurance accompanies the method described in the record, under which, as the testimony shows, such approval was only the “usual” thing. Such assurance is provided, however, if the signature must be affixed either by the hand of the Commissioner or the hand of one of these responsible subordinates. Then it is a badge of responsibility upon which both the Government and the taxpayer can rely, being a guaranty to the

former against the "improvident execution of waivers" and to the latter against "unauthorized exactions by subordinates of the Department for the purpose of curing their own delinquencies." The importance of this guaranty to the taxpayer against "unauthorized exactions" of waivers is illustrated by the fact that, as we shall show in the ~~next~~^{third} point, two of the waivers involved in this case were executed by the taxpayer in response to letters from subordinates of the Department which incorrectly stated that the period of limitation had not yet expired (see pp. 42-44, 46, *infra*).

II.

The consent in writing of the Commissioner required for the validity of the waivers was not contained in the letters requesting the waivers.

Each of the waivers involved in this case was signed and filed by the taxpayer in response to a letter requesting it (R. 21-23, 60-64, 67-68). The Board of Tax Appeals held that these letters contained the consent in writing of the Commissioner which was required for the validity of the waivers (R. 25). This conclusion, we believe, is supported by neither the authorities nor the facts.

It has obviously been the assumption of the Courts in a great number of recent cases dealing with the signature of waivers that the Commissioner's consent in writing must be recorded on the waiver form. That this is the view of the Supreme Court can hardly be doubted. In *Aiken v. Burnet*, 282 U. S. 277, 281, it referred to Section 250 (d) of the Revenue Act of 1921 as first having "specified that a *waiver be in writing and signed by the Commissioner*," and in *Stange v. United States*, 282 U. S.

270, 276, it said that “*a waiver is not a contract, and the provision requiring the Commissioner’s signature was inserted for purely administrative purposes * * **” (Italics ours.) See also *Florsheim Brothers Drygoods Co. v. United States*, 280 U. S. 452, 466-467.

Not only has the Commissioner made the same assumption, but the practice for the handling of waivers in his bureau has been established in accordance with that assumption. Since before the filing of the first waiver in this case the waiver forms had been prepared with a blank for his signature (R. 62-63), and he had issued very specific instructions and authority for the signing of such forms in his name (R.² 44; R. 74-80). The record shows that it was common practice in his bureau to see that waivers were signed with the Commissioner’s name.

We believe that this Court, unless constrained by compelling authority, will not hold groundless this common assumption upon which the Courts and the Bureau of Internal Revenue have been proceeding for many years. We do not believe that any such compelling authority is to be found.

In each of the cases relied upon by the Board of Tax Appeals, *Sabin v. United States*, 70 Ct. Cls. 574, 44 F. (2d) 70, and *Moses v. United States*, 43 F. (2d) 653 (D. C., E. D., N. Y.), the Court held that sufficient evidence of consent on the part of the Commissioner was contained in letters sent from his office. Were there any occasion, we believe that the correctness of the decisions in these lower court cases could successfully be challenged. It is sufficient, however, to point out that they are readily distinguishable from the present case. In the *Sabin* case, the letter from the Commissioner’s office acknowledged the receipt of the waiver signed by the taxpayer and was construed by the Court as advising that the waiver had been accepted. In the *Moses* case, the letter in question,

although sent before the waiver was filed, was not the usual formal request for a waiver but was apparently a letter in which the Commissioner gave his consent to a requested readjustment of tax liability which necessarily involved and contemplated the removal of the statutory bar.

Even if the consent of the Commissioner can ever be validly expressed except on the waiver form, it clearly was not expressed in any of the letters requesting the waivers in this case. They are the usual form letters in customary use for the purpose of requesting waivers (R. 60-64, 67-68). It was clearly not the intention of the Commissioner that they express his consent to the waivers. He provided for the expression of his consent by the signing of the waiver forms, and gave specific authority and instructions for the purpose of having his consent expressed in that way. Certainly the Commissioner did not intend to give his written consent to each waiver twice. Had he intended these form letters to operate as his consent, he would have given authority and instructions with respect to the signing of these letters instead of with respect to the signing of waiver forms.

Another conclusive reason why the letters requesting the waivers cannot be construed as the consent in writing of the Commissioner is that they do not even purport to be signed by the Commissioner. They purport to be signed as follows: One by a Deputy Commissioner (R. 63-64), two by a Chief of Section for an Assistant to the Commissioner (R. 60-62), and three by Collector Anderson (R. 67-68).

There is not a scintilla of evidence to show that the Commissioner authorized any of these subordinates to express the Commissioner's consent in writing to waivers in the form of signatures in their own names to formal

requests for waivers, and we submit this is clearly not a case for the application of any presumption of propriety of official action. The only appropriate presumption here is the presumption that the requests for waivers were proper.

Several reasons why the letters cannot be regarded as the consents in writing of the Commissioner are concisely stated by Mr. Trammell in his dissenting opinion as follows:

“I am inclined to think that the correspondence which appears to be relied upon to some extent to sustain the validity of the waivers and which passed prior to the execution of any waiver, is not shown to be sufficient in this case. The correspondence preceding the letter of December 16, 1927, November 5, 1928, and September 25, 1929, may, in so far as the record discloses, have been written by subordinates in the Department and the very purpose of the requirement of the consent in writing of the Commissioner and the taxpayer to the waiver is to avoid improvident execution of waivers and unauthorized exactions by subordinates and to keep the Commissioner in closer touch with matters he is charged to administer. The correspondence referred to does not disclose that the Commissioner, or any one duly authorized by him, would accept or approve the waivers when executed by the taxpayer. The respondent does not recognize the waivers received pursuant to the request for waivers as being complete when received, in view of subsequent action in having them executed by Robinson's secretary, a wholly unauthorized act” (R. 29).

III.

Collection of the deficiency would be barred even if the waivers signed with the Commissioner's name had been properly signed on his behalf.

As we have shown in Point I, collection of the deficiency was barred on March 13, 1924, unless the right of collection has been preserved by waivers (see p. 13, *supra*).

a. The first waiver was invalid because it was not signed by or on behalf of the Commissioner.

The only waiver filed before March 13, 1924, is the first waiver, an assessment waiver, dated February 2, 18, 1924. It was not signed by or on behalf of the Commissioner. As we have shown in Point I, a waiver not signed by or on behalf of the Commissioner is invalid (see pp. 13-20, *supra*). Therefore the first waiver was invalid.

b. The second waiver was invalid (1) because it was not authorized by Section 278 of the Revenue Act of 1924 and (2) because it was executed by reason of mutual mistake or fraud.

Since the first waiver was invalid, the collection of the deficiency was barred on March 13, 1924.

The second waiver, an assessment waiver dated February 18, 2, 1926, was filed while the Revenue Act of 1924 was in force. Section 277(a) of this Act provides that except as provided in Section 278, and two other sections which are not material in this case, the amount of the taxes for any prior year "shall be assessed within five years after the return was filed, and no proceeding

in court for the collection of such taxes shall be begun after the expiration of such period.” Section 278(c), which after the enactment of the Act constituted the only statutory authority for waivers (see *Florsheim Bros. Drygoods Co. v. United States*, 280 U. S. 453, 467; *Uncasville Manufacturing Co. v. Commissioner*, 55 F. (2d) 893, 896), provides as follows:

“Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.”

Section 278(e) provides as follows:

“This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.”

At the time of the enactment of the Act, June 2, 1924, the deficiency had been assessed and its collection had been barred by the period of limitation then in existence. We submit that for these reasons the waiver was not authorized by Section 278 and was therefore invalid.

The contention that where a tax was barred prior to the enactment of the Revenue Act of 1924 a waiver filed while that Act was in force was invalid was made in the case of *Burnet v. Chicago Railway Equipment Co.*, 282 U. S. 295. The point was not involved in that case, however, and the Supreme Court expressly left it open, but did say in a footnote that subdivision (e) cannot be

said to qualify every other subdivision of section 278 and there is no indication that it should qualify subdivision (c) which provides for the giving of waivers. In *Uncasville Manufacturing Co. v. Commissioner*, 55 F. (2d) 893, certiorari denied 76 L. Ed. 670, however, the Circuit Court of Appeals for the Second Circuit held such a waiver invalid on the ground that subdivision (e) does qualify subdivision (c). Judge Learned Hand writing the opinion for the majority of the Circuit Court, said at pages 895-896:

“Confessedly, had the time for assessment expired after June 2, 1924, the waivers would have been good, though executed after the expiry of the time to assess or collect. *Burnet v. Railway Equipment Co.*, 282 U. S. 295, 51 S. Ct. 137, 75 L. Ed. 349. However, section 278 (e) of the Act of 1924 (26 USCA §1062 note) declared that the section as a whole should not allow the assessment or collection of a tax, barred by existing limitations on June 2, 1924. Subdivision (c) of section 278 (26 USCA §1060 note) is necessary to the assessments because they depended upon the waivers, and there was no other law regulating waivers in effect after June 2, 1924. Thus if subdivision (e) confines subdivision (c) to cases where the assessment was not barred on June 2, 1924, the company is right. In spite of some intimations in *Burnet v. Chicago Railway Equipment Company*, which, however, expressly reserved the point, we think that an analysis of section 278 (26 USCA §§1058, 1059 and §§1060-1062 notes) as a whole does not admit of any other construction. As some confirmation we may note that in *Russell v. U. S.*, 278 U. S. 181, 49 S. Ct. 121, 73 L. Ed. 255, subdivision (d), which concerns not assessment but collection, was confined by the second part of subdivision (e) to assessments made after June 2, 1924.”

Judge Hand then proceeded to analyze the other subdivisions of the section and, we believe, conclusively demonstrated that subdivision (e) qualifies subdivision (c).

Decisions contrary to that in the *Uncasville* case have been rendered in two cases. *McDonnell v. United States*, 59 F. (2d) 290; *Pacific Coast Steel Co. v. McLaughlin*, 61 F. (2d) 73.

In *McDonnell v. United States*, the Court of Claims relied principally upon the language of the Supreme Court in *Burnet v. Chicago Railway Equipment Co.*, referred to above, and in *W. P. Brown & Sons Lumber Co. v. Burnet*, 282 U. S. 283. In the latter case there were three waivers, the first and second of which were executed before and the third of which was executed after the enactment of the Revenue Act of 1924. The Court of Claims says in the *McDonnell* case that the Supreme Court in *W. P. Brown & Sons Lumber Co. v. Burnet*, "infers that the last of the three waivers involved in that case would have been sufficient standing alone" and refers to a footnote in which the Supreme Court said:

"Inasmuch as the second and third waivers were in themselves sufficient to extend the period for collection, the first waiver may be disregarded in this connection, as was done by the lower court" (p. 287).

We submit that there is nothing in this footnote or anywhere else in the opinion of the Supreme Court which warrants the inference which the Court of Claims draws from the opinion. The text of the opinion shows that the Supreme Court regarded the third waiver valid only "because given within the period as extended by the second" (p. 287). If the Supreme Court had intended in this case to express any opinion, even by implication, on the question involved in the *Uncasville* and *McDonnell*

cases, it would certainly not have expressly left the same question open in the case of *Burnet v. Chicago Railway Equipment Co.*, *supra*, which was simultaneously argued and decided. The Supreme Court has granted a writ of certiorari in the *McDonnell* case.

In *Pacific Coast Steel Co. v. McLaughlin*, where, as in the present case, assessment had been made and the period of limitation upon collection had expired prior to the enactment of the Revenue Act of 1924, the Circuit Court of Appeals for the Ninth Circuit attempted to distinguish the *Uncasville* case upon the ground that in the latter case the waiver would have revived the right to fix the tax liability as well as the right to collect it, whereas the waiver before the Court would have revived merely the right to collect the tax. We can perceive no substance in this distinction.

The Court also argued that under the decisions in *Stange v. United States*, 282 U. S. 270, *Aiken v. Burnet*, 282 U. S. 277, and *Florsheim Brothers Drygoods Co. v. United States*, *supra*, the waiver was not necessarily dependent upon statutory authorization but was a valid common law waiver. There is nothing in these cases which supports this view. In the *Aiken* case the Supreme Court refused to hold a waiver invalid on the ground that it was executed prior to the enactment of Section 250 (d) of the Revenue Act of 1921, which contained the first express authority for waivers, but the language of its opinions in that case and the *Florsheim* case indicates that waivers filed after the enactment of statutory authority for waivers are invalid unless they are executed in compliance with such authority. In the *Aiken* case the Court said, at page 281:

“While §250 (d) first specified that a waiver be in writing and signed by the Commissioner,

there was nothing in that section which invalidated waivers made prior to its enactment or limited the effect of such instruments on the limitations therein imposed. Compare *Florsheim Bros. v. United States*, 280 U. S. 453, 467."

And in the *Florsheim* case the Court said, at page 467:

"Section 278(c) reenacted the provision as to extension of time by the consent of the Commissioner and the taxpayer; and constituted the sole statutory authority for the waiver of the period of limitation for taxes due under the 1918 and 1921 Acts. It unquestionably applied to waivers thereafter to be executed; and no reason appears why it did not equally apply to waivers executed prior to the passage of the Act."

The cases cited above to show the necessity of a signature on behalf of the Commissioner also show that waivers executed while statutory provisions for waivers are in force are dependent upon statutory authorization for their validity.

In the *Pacific Coast* case the Court referred to the cases of *Consumers' Ice Co. v. Burnet*, 60 App. D. C. 191, 50 F. (2d) 341, and *Pottash Bros. v. Burnet*, 60 App. D. C. 167, 50 F. (2d) 317, decided by this Court, as being to the same effect as the *McDonnell* case. The point could not have been presented in the first of these cases, however, because the original period of limitation could not have expired before the enactment of the Revenue Act of 1924. Nor was the point presented in the second case. There the taxpayer insisted that a waiver signed December 3, 1924, relating to 1917 taxes, was invalid because of the fact that when it was signed the tax was barred. This Court said in its opinion that the findings of the Board of Tax Appeals to the effect

that there had been filed "a chain of waivers or consents extending the time" would indicate the fact to be to the contrary, but said that it did not regard the question as material since *Stange v. United States* "in which it was held that a waiver of the limitation is effective, even though executed more than five years after the filing of the return." Nothing in the opinion shows that the tax was barred prior to the enactment of the Revenue Act of 1924 or that this Court assumed that it was.

Since subdivision (e) of Section 278 qualifies subdivision (c), the second waiver was, we submit, invalid for the additional reason that the deficiency had been assessed prior to the date of the enactment of the Act, and subdivision (e) (2) provides that the section shall not affect any assessment made prior to that time. In *Russell v. United States*, 278 U. S. 181, in holding that subdivision (e) (2) renders subdivision (d), which allows six years after assessment for collection, inapplicable where assessment was made before the enactment of the Act, the Supreme Court said, at page 188:

"Paragraph (e), (2), of §278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not 'affect' an assessment within the meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without definite purpose. *The rather obvious design, we think, was to deprive §278 of any possible application to cases where assessment had been made prior to June 2, 1924.*" (Italics ours.)

If an extension of the period of limitation for collection by the operation of subdivision (d) "affects" an assessment within the meaning of subdivision (e) (2), so must

an extension of the period by waiver under subdivision (c) and the latter form of extension must be as inoperative as the former when the assessment has been made before the enactment of the Act.

The second waiver was invalid, we believe, for the further reason that it was executed in response to a request from the office of the Commissioner contained in a letter in which it was represented that the period of limitation had not yet expired (see pp. 8-9, *supra*). This shows that the waiver was executed by reason of either a mutual mistake or a fraud on the part of someone in the Commissioner's office. In *Joy Floral Co. v. Commissioner*, 58 App. D. C. 277, 29 F. (2d) 865, this Court held a waiver executed under similar circumstances invalid. In that case the evidence of the circumstances under which the waiver was executed presented no stronger case of mistake or fraud than the corresponding evidence involved in the present case. The case apparently came to this Court upon the findings of the Board of Tax Appeals. The pertinent evidence in these findings shows merely that the waiver was executed after the Commissioner had mailed to the taxpayer a letter stating that the period of limitation would expire "presently" (7. B. T. A. 800-801). An almost identical statement was contained in a letter in response to which the waiver in the present case was filed. In holding the waiver before it invalid, this Court said, at page 867:

"In this case, it may be explained, the record discloses without dispute that, when the written consent was executed by the Commissioner and the taxpayer, they both rested under the mistaken belief that the five-year period of limitation had not yet expired. The taxpayer, it appears, was led into this belief by a written notice sent to him by the Deputy Commissioner, containing an erroneous

statement to that effect. Neither the Commissioner nor the taxpayer, when the consent was signed, actually intended it as a waiver of the taxpayer's rights if any, arising from the fact that the five-year period had already expired."

The *Joy Floral* case is not overruled on this point by any of the later decisions of the Supreme Court on the validity of waivers.

In *Panther Rubber Manufacturing Co. v. Commissioner*, 45 F. (2d) 314, the Circuit Court of Appeals for the First Circuit held that a waiver executed under similar circumstances was invalid. The Court said, at page 316:

"A waiver is the intentional relinquishment of a known right. Waiver implies knowledge and is not applicable to one who has acted without full knowledge of all of the facts. The party relying on waivers assumes the burden of proof as to the knowledge of the party making the waiver. There can, of course, be no waiver where it was obtained by duress or fraud."

* * * * *

"How do these well-established principles of the law of waiver affect this case? Neither the president nor comptroller knew at the time that the right to assess an additional tax no longer existed."

* * * * *

"Not only they did not know that the government had no power at that time to assess an additional tax, but they were misled by the agent, who asserted that unless the waiver was signed the Commissioner would at once proceed to assess the deficiency. It amounted to an assertion that the government still had the power to assess; that the period had not expired. Fraud may consist not only in stating a fact known to be false, intending

it to be relied on, but in asserting as of one's own knowledge especially by one who would be presumed to know, material facts, susceptible of knowledge, when the person so stating does not know whether they are true or false, but which in fact are false, even though he may believe them to be true."

In *J. P. Stevens Engraving Co. v. United States*, 48 F. (2d) 899, affirmed on another ground in 53 F. (2d) 1 (C. C. A., 5th Circ.), the District Court in its opinion manifested a willingness to follow *Panther Rubber Manufacturing Co. v. Commissioner*, *supra*, but for the case of *Stange v. United States*, *supra*, which it construed as foreclosing the question. In the portion of its opinion referred to by the District Court, however, the Supreme Court merely held that an assessment waiver would be construed as relating to collection as well as assessment even though when it was executed both parties believed that distraint was possible after the expiration of the statutory period for collection by suit.

c. The third waiver was invalid (1) because it was not authorized by Section 278 of the Revenue Act of 1926, (2) because it was executed by reason of a mutual mistake or fraud, and (3) because the liability for the deficiency had been extinguished by Section 1106(a) of the Revenue Act of 1926.

The third waiver, an assessment waiver dated November 18, 1926, was filed while the Revenue Act of 1926 was in force and before that Act was amended by the Revenue Act of 1928. Section 277 (a) of this Act, like the corresponding section of the Revenue Act of 1924, provides that, except as provided in Section 278, taxes for the year involved in this case shall be assessed within five years after the return was filed and no pro-

ceeding in court for collection shall be begun after the expiration of such period. Section 278 (c), which provides for waivers, was, prior to its amendment by the Revenue Act of 1928, identical with the corresponding section of the preceding Act. Section 278 (e), which corresponds with Section 278 (e) of the preceding Act, provides as follows:

“This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act.”

Subdivision (2) of this paragraph is not material in this case. We submit that in the Revenue Act of 1926, as in the preceding Act, subdivision (e) of Section 278, qualifies subdivision (c) and that since the first and second waivers failed to extend the period of limitation to February 26, 1926, the date of the enactment of the Revenue Act of 1926, the third waiver, like the second waiver, was unauthorized and invalid under the *Uncasville* case (see pp. 35-42, *supra*). The exception in subdivision (e) embraced in the words “unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto” affords no ground for distinguishing the *Uncasville* case because it obviously refers only to agreements which are valid and effective to extend the period of limitation. In the following cases waivers were held invalid by reason of Section 278 (e)

of the Revenue Act of 1926: *Wetherell Bros. Co. v. White*, 46 F. (2d) 83 (D. C., D. Mass.); *Corn Products Refining Co. v. Commissioner*, 22 B. T. A. 605, 626-627; *Jacob Bros. v. Commissioner*, 19 B. T. A. 315; *James & Holmstrom Piano Co. v. Commissioner*, 19 B. T. A. 322.

The third waiver, like the second, was executed in response to a request from the office of the Commissioner contained in a letter in which it was represented that the period of limitation had not yet expired (see pp. 8-9, *supra*). We submit that it was, therefore, like the second waiver, invalid for the additional reason that it resulted from either a mutual mistake or fraud.

Finally, we submit that the third waiver is invalid because, by reason of the fact that the first and second waivers were invalid, the liability for the deficiency had, at the time when the waiver was filed, been extinguished by Section 1106(a) of the Revenue Act of 1926 which provided in part as follows:

“The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; * * *”

Waivers have been held invalid for this reason in *Wetherell Bros. Co. v. White*, *supra*, and a uniform line of decisions of the Board of Tax Appeals. *Peerless Woolen Mills v. Commissioner*, 13 B. T. A. 1119; *Steiner Manufacturing Co. v. Commissioner*, 18 B. T. A. 740; *Melville W. Thompson v. Commissioner*, 18 B. T. A. 1192; *United States Refractories Corp. v. Commissioner*, 23 B. T. A. 872; *Knight-Campbell Music Co. v. Commissioner*, 23 B. T. A. 1234; *Northern Coal Co. v. Commissioner*, 24 B. T. A. 307. None of the decisions of the Supreme Court upon the effect of waivers executed after the expiration of the period of limitation involved waivers

filed while Section 1106 (a) was in force. Section 612 of the Revenue Act of 1928, which repealed Section 1106 (a) "as of February 26, 1926," could not, of course, retroactively affect the validity of waivers executed while the section was in force. See *Peerless Woolen Mills v. Commissioner*, *supra*, p. 1131; *Steiner Manufacturing Co. v. Commissioner*, *supra*, p. 741; *United States Refractories Corp. v. Commissioner*, *supra*, p. 878. It has been uniformly held that Section 612 did not recreate liability extinguished by Section 1106 (a). See *United States v. John Barth Co.*, 27 F. (2d) 782, 784 (C. C. A., 8th Circ.), reversed on another ground, 279 U. S. 370; *Dobbins v. Commissioner*, 31 F. (2d) 935, 937 (C. C. A., 3rd Circ.); *Griffiths v. Commissioner*, 50 F. (2d) 782, 785-786 (C. C. A., 7th Circ.); *Pepsin Syrup Co. v. Schwaner*, 35 F. (2d) 197, 199 (D. C., S. D., Ill.); *Wettengel v. Robinson*, 300 Pa. 355, 150 Atl. 658, 662.

d. The fourth waiver was invalid (1) because it was not authorized by Section 278 of the Revenue Act of 1926 and (2) because the liability for the deficiency had been extinguished by Section 1106 (a) of the Revenue Act of 1926.

The fourth waiver, a collection waiver dated December ¹⁵~~22~~, 1927, was, like the third waiver, filed while the Revenue Act of 1926 was in force and before that Act was amended by the Revenue Act of 1928. The statutory authority for collection waivers in the Revenue Act of 1926 was contained in Section 278 (d) which, prior to its amendment by the Revenue Act of 1928, provided as follows:

"Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within

the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

Since subdivision (e) of Section 278 qualifies the authority for assessment waivers given by subdivision (c) it must likewise qualify the authority for collection waivers given by subdivision (d). Therefore, the prior waivers having been insufficient to extend the period of limitation to the date of the enactment of the Revenue Act of 1926, we submit that the fourth waiver was, like the second and third waivers, unauthorized and invalid under the *Uncasville* case.

Like the third waiver, the fourth waiver was invalid also because when it was filed the liability for the deficiency had been extinguished by Section 1106 (a) of the Revenue Act of 1926.

e. The fifth waiver was invalid because it was not authorized by Section 278 of the Revenue Act of 1926.

The fifth waiver, a collection waiver dated October 17, 1928, was filed while the Revenue Act of 1926, as amended by the Revenue Act of 1928, was in force. Section 278 (d) of the Revenue Act of 1926 as amended by Section 506 of the Revenue Act of 1928 provided as follows:

"Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly

applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer *before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon*" (Italics ours.)

The only material amendment to this subdivision of Section 278 was the addition of the italicized portion which added an express requirement that the waiver be filed before the expiration of the period of limitation. A similar requirement was added to subdivision (c). These amendments clearly show no intention to authorize waivers with respect to taxes barred at the time of the enactment of the Revenue Act of 1926. Therefore, since the period of limitation expired prior to the enactment of the Revenue Act of 1926, the fifth waiver was, like the fourth waiver, unauthorized and invalid under the *Uncasville* case unless, by reason of subdivision (f) which was added to Section 278 by Section 506 of the Revenue Act of 1928, subdivision (e) ceased to qualify subdivision (d).

Subdivision (f) provides as follows:

"Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

This subdivision applies only to waivers "which would be within the provisions of subdivision (c) or (d)." Thus

it merely modifies subdivisions (c) and (d) so that the new requirement that waivers be executed before the expiration of the period of limitation shall not apply to waivers filed between the enactment of the Revenue Act of 1928 and January 1, 1929. It does not purport to authorize any waiver which would not have been authorized by subdivision (c) or subdivision (d) before this new requirement was added. Before this new requirement was added, subdivision (e) qualified subdivisions (c) and (d) so that they did not authorize waivers with respect to taxes barred before the enactment of the Revenue Act of 1926. Subdivision (f) does not purport to modify or affect subdivision (e) in any way. Therefore, we submit, subdivision (e) continued to qualify subdivisions (c) and (d) with respect to all waivers including those filed in the period covered by subdivision (f), and the fifth waiver was therefore unauthorized and invalid.

f. The sixth waiver was invalid because it was not authorized by Section 278 of the Revenue Act of 1926.

The sixth waiver, a collection waiver dated September 27, 1929, was filed while the Revenue Act of 1926, as amended by the Revenue Act of 1928, was in force, but after the period specified in subdivision (f), and was therefore clearly invalid under subdivision (d) as amended.

g. The fourth, fifth and sixth waivers do not affect this case even if valid.

Even if the fourth, fifth and sixth waivers were all valid, we submit that they were insufficient to justify the determination of a deficiency by the Board of Tax Appeals, which was made on April 20, 1931 (R. 21), because all of them were filed after the proceeding before the

Board had been instituted and expired before April 20, 1931, and their effectiveness was not extended by Section 277 (b) of the Revenue Act of 1926 which suspends the running of the statute of limitations until sixty days after the decision of the Board has become final.

The case of *Burnet v. Chicago Railway Equipment Co.*, 282 U. S. 295, involved a waiver filed after the institution of the proceeding before the Board. The waiver provided that "the time for making any assessment * * * shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer * * * before said date and * * * if an appeal is filed with said Board, then said date shall be extended by the number of days between the date of mailing of such notice of deficiency and the date of final decision by said Board." The taxpayer contended that by its terms the waiver expired December 31, 1926, because, since the appeal to the Board had already been taken when the waiver was filed, the provisions purporting to extend the time for assessment were inapplicable. The Supreme Court held that the extension provisions of the waiver were applicable because the letter from the Commissioner in response to which the waiver was filed showed that these provisions "were clearly intended to be applicable." It is significant that although the applicable revenue act, the Revenue Act of 1924, contained a provision similar in effect to section 277 (b) of the Revenue Act of 1926, the Supreme Court disposed of the case entirely on the basis of the intention of the parties and did not even suggest that, irrespective of the express extension provisions contained in it, the effect of the waiver was extended by statute. This shows, we believe, that the effect of a waiver filed after the institution of a proceeding before the Board is determined by the intention of the parties, in accordance with the gen-

eral rule of construction of waivers (see *United States v. Southern Lumber Co.*, 51 F. (2d) 956, 960; *Stange v. United States*, 282 U. S. 270, 276-277), and its effect is not automatically extended by section 277 (b) regardless of such intention.

The evidence in the present case shows clearly that the parties did not intend that the fourth, fifth and sixth waivers have any effectiveness beyond their respective expiration dates. The letter of Collector Anderson dated November 5, 1928, in response to which the fifth waiver was filed (R. 58), is as follows:

“There is attached waiver covering outstanding tax of \$42,702.50 for the year 1918. *Waiver covering this account, which was signed by you, [the fourth waiver] expires on December 31st, 1928.* Inasmuch as it appears that this account is still pending before the United States Board of Tax Appeals it is requested that the enclosed forms be signed and returned to this office as soon as possible.” (Italics ours.) (R. 67.)

This letter shows that the Collector did not regard these waivers as effective beyond their expiration dates. Coupled with the fact that the parties executed three waivers overlapping each other instead of executing only one, which would have been sufficient if Section 277 (b) applied, it negatives any intention that any of these waivers remain effective beyond their expiration dates. We submit, therefore, that the fourth, fifth and sixth waivers, even if valid, are insufficient to sustain the decision of the Board of Tax Appeals.

Because all of the waivers were invalid and because the fourth, fifth and sixth waivers, if valid, would have expired before the Board of Tax Appeals rendered its determination of a deficiency, we submit that collection

of the deficiency is barred even if the waivers signed with the Commissioner's name should be held to have constituted his consent in writing.

IV.

The petitioner is not estopped to deny the validity of the waivers.

In the Board of Tax Appeals the respondent argued that the petitioner is estopped to deny the validity of the waivers because by filing them he secured further consideration of his tax liability. In making this argument the respondent relied principally upon the language of the District Court for the Western District of Pennsylvania in *Liberty Baking Co. v. Heiner*, 34 F. (2d) 513, affirmed 37 F. (2d) 703 (C. C. A., 3rd Circ.), to the effect that it is unconscionable for a taxpayer to repudiate a waiver after having obtained further consideration of his tax liability upon the basis of it.

In that case the taxpayer, attacking the validity of waivers, made two points, first, that the corporate officers who executed them had no authority to do so, and, second, that they were not properly executed on behalf of the Commissioner. The language relied upon by the respondent was used by the Court in disposing of the first point. That point is not involved in the present case. On the other point, the Court merely applied the general rule that, in the absence of evidence to the contrary, the signature of the Commissioner appearing on a waiver will be presumed to have been properly affixed. This presumption, as we have shown in Point I, is rebutted in the present case by the evidence. Thus *Liberty Baking Co. v. Heiner* is clearly distinguishable.

There is absolutely nothing in the record tending to show any misrepresentation or other act on the part of the petitioner which makes it unconscionable for him now to attack the validity of the waivers. There is no evidence indicating that prior to the trial he had any knowledge of the existence of the objections to the waivers which he now urges. The sole ground for the attempt to apply against the taxpayer the doctrine of estoppel is that the taxpayer received benefits which he would not have received had the waivers not been filed. This falls very far short of presenting a case of estoppel.

The respondent's present embarrassment does not result from unconscionable conduct on the part of the taxpayer but solely from the delinquency of his own office in failing to obtain timely waivers and have them properly executed on the part of the Commissioner. As the Circuit Court for the Sixth Circuit said in *Essex Coal Co. v. Commissioner*, 39 F. (2d) 892, at page 895, the Commissioner "cannot create an estoppel by his own failure to perform the act directed by the plain provision of the law." In *Corn Products Refining Co. v. Commissioner*, 22 B. T. A. 605, the Board of Tax Appeals said, at page 621:

"* * * we do not think that the principle of estoppel should be invoked to take the place of what is required by statute, that is, an instrument in writing in which the consent of both parties is expressed."

In *Gott v. Live Poultry Transit Co.*, 153 Atl. 801, the Court of Chancery of the State of Delaware refused to hold a taxpayer estopped to deny the validity of a waiver, saying, at page 805:

"I know of no case which holds that an estoppel, for which the government contends in

this case, can be held to arise where the conduct on which it rests is the conduct of the party claiming the benefit of the estoppel in mistakingly judging, as here, what the rules of law are, and where no element of fraudulent concealment or misrepresentation on the part of the other party is shown.”

It would be an extraordinary doctrine of law which would hold that by submitting a waiver a taxpayer disqualifies himself from questioning its validity on the ground that it does not comply with the statutes. It is inconceivable that if such a doctrine were valid the Courts would have ignored it for the past decade and devoted their time to serious consideration of the many difficult questions involved by taxpayers’ attacks upon the validity of waivers.

The case of *Botany Worsted Mills v. United States*, 278 U. S. 282, which is described on pages 15-16, *supra*, shows clearly, we believe, that the receipt of benefits by a taxpayer under departmental action not conforming to the statutes does not estop him from questioning the validity of that action. In that case the Supreme Court held that although the taxpayer had accepted benefits under an informal settlement of tax liability made with the Commissioner it was not estopped to repudiate that settlement as not conforming to the statute and maintain an action for a refund in derogation of it.

CONCLUSION.

It is respectfully submitted that the order and determination of the Board of Tax Appeals in this case should be reversed.

Respectfully submitted,

RICHARD E. DWIGHT,
Attorney for the Petitioners.

RICHARD E. DWIGHT,
HOWE P. COCHRAN,
FREDERICK S. WINSTON,
WILLIAM N. WOOD,
HAROLD L. SMITH,
CURTISS E. FRANK,
Of Counsel.

APPENDIX

Revenue Act of 1921, § 250 (d) (42 Stat. 265):

The amount of income, excess-profits or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, * * *,"

Revenue Act of 1924, § 277 (a) (43 Stat. 299):

Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act en-

titled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

Revenue Act of 1924, § 278 (c) (43 Stat. 300) :

Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

Revenue Act of 1924, § 278 (d) (43 Stat. 300) :

Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

Revenue Act of 1924, § 278 (e) (43 Stat. 300) :

This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

Revenue Act of 1926, § 277 (a) (44 Stat. 58):

Except as provided in section 278—

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Revenue Act of 1926, § 277 (b) (44 Stat. 58-59):

The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

Revenue Act of 1926, § 278 (c) (44 Stat. 59):

Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

Revenue Act of 1926, § 278 (d) (44 Stat. 59):

Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the en-

actment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

Revenue Act of 1926, § 278 (e) (44 Stat. 59):

This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act.

Revenue Act of 1926, § 1106 (a) (44 Stat. 113):

The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Revenue Act of 1928, § 504 (a) (45 Stat. 870):

Section 277 (b) of the Revenue Act of 1926 is amended to read as follows:

“(b) The running of the statute of limitations provided in this section or in section 278 on the mak-

ing of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final) and for 60 days thereafter.”

Revenue Act of 1928, § 506 (45 Stat. 870-871):

(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

“(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

“(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.”

(b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

“(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929.”

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

Revenue Act of 1928, § 612 (45 Stat. 875):

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1932

No. 5657

**MARIE J. J. FLEITMANN AND THOMAS CRIMMINS,
EXECUTORS OF THE ESTATE OF HERMAN C.
FLEITMANN, DECEASED, APPELLANTS,**

vs.

**DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.**

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED APRIL 13, 1932.

PRINTED JUNE 15, 1932.

Court of Appeals of the District of Columbia

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Court of Appeals of the District of Columbia

No. 5657.

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Ap-
pellants,

vs.

DAVID BURNET, Commissioner of Internal Revenue.

1 Docket No. 28451.

HERMAN C. FLEITMANN, Amended Title MARIE J. J. FLEIT-
mann and Thomas Crimmins, Executors of the Estate of
Herman C. Fleitmann, Deceased (See Order of 3-2-31),

vs.

COMMISSIONER OF INT. REV.

For Taxpayer: Howe P. Cochran, Esq., Harry Fried-
man (Withdrawn), Richard E. Dwight, Esq., W. N. Wood,
Esq., F. S. Winston, Esq.

For Commissioner: Bruce A. Low, Esq., M. B. Leming,
Esq., L. H. Rushbrook, Esq., E. Meacham, Esq.

Docket Entries.

1927.

May 13. Petition received and filed. Taxpayer notified.

“ 14. Copy of petition served on General Counsel.

July 5. Motion for extension of time to 10-11-27 to
answer, filed by G. C.

“ 6. Granted. Both sides notified.

Sept. 23. Answer filed by G. C.

“ 26. Copy served on taxpayer—General Calendar.

1929.

Apr. 4. Hearing set May 21, 1929.

“ 9. Motion to place on the Reserve Cal., filed by
G. C. 4-11-29 Granted.

Nov. 13. Hearing set Jan. 15, 1930.

1929.

- Dec. 19. Motion for leave to amend petition, amendment tendered, filed by taxpayer. 12-20-29 Granted.
- “ 20. Motion to limit hearing as to whether the assessment is barred by the statute of limitations, filed by taxpayer. 12-31-29 Granted.
- “ 27. Copy of motion and amended petition served on G. C.

1930.

- Jan. 7. Notice of appearance of W. N. Wood as counsel for taxpayer filed.
- “ 9. Motion to place on the Reserve Cal. filed by G. C. 1-10-30 Granted.
- “ 15. Answer to amended petition filed by G. C. Copy served 1-16-30.
- July 16. Motion to place on the day calendar filed by taxpayer.
- “ 17. Motion granted to Oct. 2, 1930.
- Sept. 24. Notice of the appearance of Harry Friedman, counsel for taxpayer filed.
- “ 24. Motion for continuance to Oct. 8, 1930 filed by taxpayer. 9-26-30 Granted.
- “ 24. Motion for leave to file amended answer filed by G. C. Amended answer tendered.
- “ 26. Motion to amend granted.
- “ 26. Application for subpoena duces tecum to Burnet and Robinson filed by taxpayer. 9-29-30 Subpoena issued.
- “ 29. Subpoena duces tecum served (2).
- Oct. 2. Application for subpoena filed by taxpayer (D. H. Blair). Subpoena issued. 10-4-30 Subpoena served.
- “ 2. Application for subpoena filed by G. C. (Edith Mead). Subpoena issued.
- “ 3. Application for subpoena filed by G. C. (H. C. Fleitmann). 10-3-30 Subpoena issued.
- 2
- “ 7. Application for subpoena of Robert H. Lucas filed by taxpayer. Subpoena issued. Subpoena served.

1930.

- Oct. 8. Hearing had before Mr. Arundell. Submitted.
Held up pending hearing on Dkts. 28450 and
17121.
- “ 11. Transcript of hearing of Oct. 8, 1930 filed.
- “ 23. Application for subpœna of Wm. J. O'Brien
and J. S. Shea filed by taxpayer.
- “ 23. Subpœna issued. 10-24-30 Subpœna served.
- Nov. 3. Transcript of hearing of Oct. 27-28, 1930 filed.
- Dec. 19. Motion for extension to Jan. 5, 1931 to file brief
and 30 days for reply brief filed by G. C. and
granted.

1931.

- Jan. 5. Memo. filed by taxpayer. 1-5-31 Copy served
on G. C.
- “ 3. Brief filed by G. C.
- “ 28. Reply brief filed by G. C.
- “ 30. Notice of withdrawal of Harry Friedman as
counsel for taxpayer filed.
- “ 30. Notice of appearance of Howe P. Cochran as
counsel for taxpayer filed.
- “ 30. Motion for extension of two weeks to file reply
brief, filed by taxpayer. 1-31-31 Granted.
- Feb. 18. Reply brief filed by taxpayer. 2-19-31 copy
served on G. C.
- Mar. 2. Order to substitute Marie J. J. Fleitman and
Thomas Crimmins, Executors of the Estate
of Herman D. Fleitman, deceased, as peti-
tioner entered.
- Apr. 20. Findings of fact and opinion rendered, C.
Rogers Arundell, Div. 7. This proceeding
will be restored to the general calendar for
hearing on the merits.
- “ 23. Hearing set May 28, 1931.
- May 28. Hearing had before Mr. Murdock. Stipulation
as to deficiency filed.
- “ 29. Decision entered, John E. Murdock, Div. 3.
- Nov. 27. Supersedeas bond in the amt. of \$29,653.00 ap-
proved and ordered filed.
- “ 27. Stipulation for review by Ct. of Ap. of D. C.
filed.
- “ 27. Petition for review to Ct. of Ap. of D. C. with
assignments of error, filed by taxpayer.

1931.

Nov. 27. Proof of service filed.

Dec. 29. Statement of evidence lodged.

“ 29. Notice of lodgment of statement and of hearing
Jan. 13, 1932, filed.

1932.

Jan. 12. Objections to statement of evidence filed by
G. C.

“ 13. Hearing had before Mr. Arundell on approval
of statement of evidence. Continued to
2-17-32 to enable parties to prepare new state-
ment of evidence.

“ 13. Order of continuance to Feb. 17, 1932 for hear-
ing on approval of statement of evidence
entered.

“ 18. Motion for 60 day extension to prepare and
transmit record filed by taxpayer.

“ 19. Order enlarging time to March 26, 1932 for
preparation of evidence and delivery of
record entered.

3

Feb. 10. Motion for continuance until after 3-1-32 on
statement of evidence filed by G. C.

“ 12. Order of continuance to 3-2-32 entered.

Mar. 2. Hearing had before Mr. Arundell on approval
of statement of evidence. Parties to submit
agreed statement.

“ 16. Motion for extension to 4-15-32 to prepare and
transmit record filed by taxpayer.

“ 17. Order enlarging time to Apr. 15, 1932 for
preparation of evidence and delivery of
record entered.

“ 23. Agreed statement of evidence lodged.

“ 25. Agreed statement of evidence approved and
filed.

“ 29. Agreed præcipe filed. Proof of service thereon.

4

Filed Dec. 20, 1929.

United States Board of Tax Appeals.

Docket No. 28451.

HERMAN C. FLEITMANN, 356 Fourth Ave., New York, N. Y.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amended Petition.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in the deficiency letter (IT: CR: G-9-60D-CCB) dated March 14, 1927 and, as the basis for his appeal, sets forth the following:

(1) The taxpayer is an individual with his office at 356 Fourth Avenue, New York, N. Y.

(2) The deficiency letter, a copy of which is attached, (Exhibit A) was mailed to the taxpayer on March 14, 1927 and showed deficiencies as follows:

Calendar year 1919	\$14,590.77
Calendar year 1920	26,959.01
Calendar year 1921	7,200.20
Total	\$48,749.98

(3) The taxes in controversy are income and surtaxes for the calendar years 1919, 1920 and 1921 in the amount of \$48,749.98.

(4) The determination of taxes contained in the said deficiency letter is based upon the following errors:

(a) Failure of the Commissioner to hold that the assessment and collection of the deficiencies for the years 1919, 1920 and 1921 were barred by the statute of limitations.

(b) The Commissioner in determining the amount of non-taxable dividends received by the taxpayer from Fleitmann & Co., Inc. erroneously concludes that the income of the Corporation available for dividends, be not reduced by

the provisions of the agreement of the incorporators
5 of Fleitmann & Co., Inc., setting aside \$100,000.00
annually out of earnings, after the payment of preferred dividends at the rate of 6% per annum and common dividends at the rate of 7% per annum, as a fund to purchase or retire the preferred stock of the Corporation.

(c) The Commissioner has erroneously used the average consolidated income of Fleitmann & Co., Inc. and Fairmont Manufacturing Company as a basis of determining the income available for dividends paid by Fleitmann & Co., Inc.

(d) The Commissioner has understated the amount of non-taxable dividends assigned to the taxpayer as his proportion of the common dividend paid July 3, 1918 from paid-in surplus of Fleitmann & Co., Inc.

(e) The Commissioner has erroneously used the average shareholdings of the taxpayer for the period May 24, 1918 to December 31, 1918 as a basis of determining the amount of common dividends received by the taxpayer July 3, 1918 from paid-in surplus of Fleitmann & Co., Inc.

(f) The Commissioner has failed to exclude from the taxable income of the taxpayer for 1919 and 1920, dividends received from Fleitmann & Co., Inc. in excess of earnings available for dividends and/or from paid-in surplus of the Corporation.

(g) The Commissioner has erroneously included in taxable income for 1918, \$367.43 of non-taxable Liberty Bond interest as accruing to the taxpayer from an adjustment of the distributive shares of the earnings of Fleitmann & Co., Inc. for the period January 1, 1918 to May 23, 1918.

(h) The Commissioner has erroneously included in taxable income for 1919, \$10,211.58 as the taxpayer's share of the undistributed profits of Seaboard Mills, Inc. and \$11,752.00 as his share of the dividends received by Seaboard Mills, Inc.

(i) The Commissioner has erroneously included in taxable income for 1920, \$36,712.21 as the taxpayer's share of the undistributed profits of Seaboard Mills, Inc. and \$7,579.00 as his share of the dividends received by Seaboard Mills, Inc.

(j) The Commissioner has erroneously included in taxable income for 1921, \$16,065.85 as the taxpayer's share of

the undistributed profits of Seaboard Mills, Inc. which include \$12,196.60 as dividends received by Seaboard Mills, Inc. and are erroneously made subject to normal tax.

6 (5) The facts upon which the taxpayer relies as a basis for his appeal are as follows:

(a) The income tax returns of the petitioner for the years 1919, 1920 and 1921 were filed on — — —, — — —, and — — —, — — —, respectively. The deficiency letter proposing the deficiencies is dated March 14, 1927, a date more than five years after the returns for the years 1919 and 1920 and more than four years after the return for the year 1921 were filed. The proposed deficiencies for the years 1919, 1920 and 1921 were not assessed or collected within the statutory period of limitations.

(b) Fleitmann & Co., Inc. was incorporated May 24, 1918 and took over the business of the partnership of Fleitmann & Company as of January 1, 1918 pursuant to the terms of an agreement dated April 30, 1918 and originally filed its tax return for the full calendar year 1918.

(c) The agreement between the partners with respect to the incorporation of the Company provided as follows:

“Fourth. The parties hereto agree that after the payment of dividends on the preferred stock and the payment of dividends at the rate of seven per cent (7%) per annum on the common stock, or the setting aside of an amount sufficient for such dividends, the Corporation shall set aside out of its earnings in each year for a period of five years commencing with the fiscal year ending December 31st, 1918, the sum of \$100,000 as a surplus fund, and further agree that out of the reserve so created \$50,000 in each year of the third, fourth and fifth years shall be employed to purchase or retire the preferred stock of the Corporation.

“In the event that the surplus earnings in any year, after paying or providing for dividends on the preferred stock and dividends at the rate of seven per cent (7%) per annum on the common stock, should be insufficient to set aside the full amount of \$100,000 the deficiency shall be made up out of such surplus earnings of the subsequent year or years of said five year period.”

(d) Fleitmann & Co., Inc. declared dividends out of the profits of the year 1918, including the profits earned between January 1st and May 23, 1918, on the assumption

that the entire profits of the year 1918 represented earned surplus and the stockholders reported such dividends as taxable income and paid taxes thereon.

7 (e) A field examination disclosed that Fleitmann & Co., Inc. was prevented from filing a return for the whole year by Section 330 of the Revenue Act of 1918, because its net income was less than 20% of its invested capital.

(f) Fleitmann & Co., Inc., on or about October 27, 1923, filed an amended return for the period May 24, 1918 to December 31, 1918 and for the calendar years 1919, 1920 and 1921, pursuant to the field examination, at the same time exercising its right to consolidate with the Fairmont Manufacturing Company by virtue of its ownership and control of over 97% of the outstanding voting stock of that Company, and as no new books had been opened for the corporation, the balances as of May 31, 1918 were adjusted to the date of incorporation, May 24, 1918 for the purpose of the amended returns. The following statement illustrates the manner in which the incorporation agreement was carried out, viz:

Assets acquired from the partnership:

Cash, Foreign Balances, Accounts and Notes Receivable.....	\$3,497,684.29
Investments—at cost to partnership.....	899,228.85
Advances, etc. less \$20,700 credited on indebtedness of Estate..	560,519.00
Deferred charges, etc.....	23,629.18
Installation and Furniture & Fixtures.....	34,657.11

Total Assets acquired of Partnership.....	5,015,718.43
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Assets acquired from Estate of Hermann Fleitmann:

Shares—Union-Buffalo Mills Co.....	955,000.00
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Total Assets.....	\$5,970,718.43
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Paid for by the Corporation as follows:

4,210 shares common stock issued to F. T. Fleitmann.....	\$421,000.00
2,850 shares common stock issued to W. M. Fleitmann.....	285,000.00
6,630 shares common stock issued to H. C. Fleitmann.....	663,000.00

Total Common stock issued.....	\$1,369,000.00
10,000 shares preferred stock issued to Estate of Hermann Fleitmann or Executors & Trustees.	1,000,000.00

Total capital stock issued.....	2,369,000.00
Notes Payable, Accounts Payable & Sundry Accruals assumed.....	3,028,551.85

	5,397,551.85
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Paid-in Surplus.....	\$573,166.58
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8 The paid-in surplus represents:

Earnings from January 1, 1918 to May 23, 1918..	\$161,240.48	
Adjustment of values of investments to cost to partnership pursuant to Sec. 331 of the Revenue Act of 1918.....	389,679.01	
Account Receivable disallowed by Federal Tax Examiner as a deduction for 1917.....	22,247.09	
Paid-in surplus as above.....		\$573,166.58

(g) Exhibit B, hereto annexed, is a statement showing income of Fleitmann & Co., Inc. available for dividends for the period May 24, 1918 to December 31, 1918, and for the calendar years 1919 and 1920, and also shows that common dividends have been apportioned as paid from the paid-in surplus of the Corporation, viz:

July 3, 1918 and December 23, 1918.....	\$104,342.70
June 5, 1919.....	56,897.78
March 12, 1920.....	48,282.09

(h) The taxpayer's share of said dividends apportioned as received during 1918 from paid-in surplus of Fleitmann & Co., Inc. is \$54,599.57, arrived at as follows:

2% Common Dividend paid July 3, 1918 on 9,130 shares (all from paid-in surplus).....	\$18,260.00
7% Common Dividend paid Dec. 23, 1918 on 9,130 shares -63,910.00 and as the taxpayer's shareholdings were 50.498% of the total outstanding common shares at Dec. 23, 1918, his share of the dividend from paid-in surplus was.....	36,339.57
Total Dividends received in 1918 by taxpayer from paid-in Surplus of Fleitmann & Co., Inc.....	\$54,599.57

The foregoing information in respect of 1918 is submitted herein as relating in part not only to the present appeal but to the petitioner's appeal for 1918 now before the General Counsel of the Bureau of Internal Revenue, where the case is now pending.

(i) The taxpayer's share of the dividends apportioned as received during 1919 from paid-in surplus of Fleitmann & Co., Inc. is \$28,542.77 arrived at as follows:

7¼% Common Dividend paid June 5, 1919 on 9,130 shares ...	\$66,192.50
and as the taxpayer's shareholdings were 50.165% of the total outstanding common shares at June 5, 1919, his share of the dividend from paid-in surplus was.....	28,542.77

(j) The taxpayer's share of the dividends apportioned as received during 1920 from paid-in surplus of Fleitmann & Co., Inc. is \$12,247.24 arrived at as follows:

7% Common Dividend paid March 12, 1920 on 5,200 shares.	\$36,400.00
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and as the taxpayer's shareholdings were 25.366% of the total outstanding common shares at March 12, 1920, his share of the dividend from paid-in surplus was.	12,247.24
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(k) The field Examiner rendered a partnership report for the period January 1, 1918 to May 23, 1918 (which is upheld by the Commissioner in his deficiency letter of April 20, 1926 in paragraph 4 of the statement attached thereto) and reported taxable income accruing to the petitioner of $41\frac{2}{3}\%$ of the profits of the so-called "partnership" and $41\frac{2}{3}\%$ of the dividends received by the so-called "partnership" and these profits and dividends are taxed as such in arriving at the tax for 1918. An adjustment by the Commissioner in Exhibit A of his present deficiency letter, increasing the taxpayer's distributive share of "partnership" income \$465.80 represents \$367.43 non-taxable Liberty Bond interest and \$98.37 Mutual Insurance Dividends, the latter item being a credit to expense. This error of including non-taxable Liberty Bond interest is herein brought to the attention of the General Counsel of the Bureau of Internal Revenue where the 1918 case is now pending.

(l) The partnership of Fleitmann & Company terminated its existence December 31, 1917, pursuant to the terms of an agreement dated April 30, 1918, and the taxpayer's interest in the Corporation, instead of being $41\frac{2}{3}\%$ was 48.43% and increased to 50.17% during the year 1918.

(m) The Treasury Department has refused Seaboard Mills, Inc. classification as a personal service corporation under the provisions of Section 200 of the Revenue Act 1918 and the Seaboard Mills, Inc., having appealed to the United States Board of Tax Appeals, Docket 5499, for classification as a personal service corporation for 1918, has been denied this classification under the decision of the Board, dated November 20, 1926, Decision No. 1916.

10 6. Wherefore the petitioner prays that this Board may hear the proceeding and decide:

I. That the proposed deficiencies for the years 1919, 1920 and 1921 are barred from assessment and collection.

II. The amount of income available for dividends in respect of Fleitmann & Co., Inc. and not of the consolidated income of Fleitmann & Co., Inc. and the Fairmont Manufacturing Company, should be calculated with consideration of the provisions of the incorporators' Agreement of April 30, 1918, setting aside earnings of \$100,000.00 annually for the retirement of preferred stock of Fleitmann & Co., Inc.

III. Dividends received from Fleitmann & Co., Inc. in excess of earnings available for dividends and/or paid from paid-in surplus, should be excluded from the taxpayer's taxable income as a return of capital and be calculated with respect to shareholdings at time of dividend payments.

IV. No part of the Liberty Bond Interest included in the adjustment of income of Fleitmann & Co., Inc. for the period January 1, 1918 to May 23, 1918 should be included in taxable income of the taxpayer.

V. No part of the undistributed earnings of the Seaboard Mills, Inc. should be included in taxable income of the taxpayer.

RICHARD E. DWIGHT,

Counsel for Taxpayer,

100 Broadway, New York, N. Y.

STATE OF NEW YORK,

County of New York, ss:

Herman C. Fleitmann, being sworn, says that he is the taxpayer above named, that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

HERMAN C. FLEITMANN.

Subscribed and sworn to before me this 16th day of December, 1929.

[SEAL.]

HARRY LANGFORD,

Notary Public.

Harry Langford, Notary Public, Nassau County.

Certificate filed in New York Co.

Co. Clerk's No. 611, Reg. No. 1L413.

Commission expires March 30, 1931.

EXHIBIT A.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:CR:G-9-60D. CCB.

March 14, 1927.

Mr. Herman C. Fleitmann,
356 Fourth Avenue,
New York, New York.

SIR:

An examination of your income tax returns in connection with a Revenue Agent's recommendation for the years 1919 and 1920 discloses additional tax aggregating \$48,749.98 for the years 1919, 1920 and 1921.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C. and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:CR:G-9-60D-CCB. In the event that you

acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,

Commissioner,

By C. R. NASH,

Assistant to the Commissioner.

Inclosures: Statement, Form A, Schedules 1 to 6, inclusive, Form 882.

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Form A.

IT:CR:G-9-60D. CCB.

In re Mr. Herman C. Fleitmann, New York, New York.

Waiver of Right to File a Petition with the U. S. Board of Tax Appeals.

The undersigned taxpayer hereby waives the right to file a petition with the U. S. Board of Tax Appeals under Section 274(a) of the Revenue Act of 1926 and consents to the assessment and collection of a deficiency in tax for the year or years 1919, 1920 and 1921, aggregating \$48,749.98.

(Name.) ———, [SEAL.]

(Address.) ———,

By ———.

Date: ———, ———.

NOTE.—This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 1106 of the Revenue Act of 1926.

13 *Statement of Returns Examined and Resulting Tax Liability.*

Returns Examined.

Individual.	Year.	Form.	Date filed.
Herman C. Fleitmann, 356 Fourth Avenue,	1919	1040	March 15, 1920
New York, New York.	1920	1040	March 15, 1921
	1921	1041	March 15, 1922

Tax Liability.

Individual.	Year.	Deficiency.
Herman C. Fleitmann, 356 Fourth Avenue, New York, New York.	1919	\$14,590.77
	1920	26,959.01
	1921	7,200.20
Total.....		\$48,749.98

Full details of the adjustments producing the above-stated results are contained in the attached Schedules 1 to 6, inclusive, and Schedules 5 to 7 of Bureau letter dated April 8, 1926.

Consideration has been given to the statements made in the various briefs recently submitted and to conclusions reached in conference of December 13, 1926 held jointly on the tax liability of the corporation of Fleitmann and Company, for the period May 24, 1918 to December 31, 1918 and later years and on the individual tax liability of the partners of Fleitmann and Company for the calendar years 1918 to 1921, inclusive, growing out of the receipt by them of dividends paid in part from earnings of the partnership for the period January 1, 1918 to May 23, 1918, which earnings were left in the business and became paid-in surplus to the corporation of Fleitmann and Company.

It has been held that income available for the payment of dividends for the period May 24 to December 31, 1918 be not reduced by the provisions of the voting trust agreement of May 22, 1918, setting aside \$100,000.00 annually for the retirement of preferred stock. Following this recommendation, the income available for the payment of dividends has not been reduced by this sum and has been computed in accordance with the usual method used by the Bureau on the income for the various periods or years, as a whole, and not by the method used in Schedule N submitted with the amended corporation return for 1918.

14 The income available for the payment of dividends in 1918 as thus computed, has, when exceeded by dividends actually paid, been used as the basis of determining the amounts paid from partnership earnings or paid in surplus as at May 24, 1918. Your taxable income for 1918 has been reduced only by dividends on the common stock held by you during that year. The resulting change has been brought to the attention of the General Counsel of the Bureau of Internal Revenue where the 1918 case is now pending.

Conforming to the provisions of Article 1542, Regulations 45, it is held that the dividends paid in 1919 and later years were paid from earnings of those years to the extent that such earnings were sufficient, or from earned surplus accumulated subsequent to May 24, 1918 which was ample. Consequently, there was no further return after December 31, 1918 of any part of the paid-in surplus of Fleitmann and Company and no adjustment has been made to the income of the partners for 1919 and later years on account of any part of it having been fully taxed to them as income received from the partnership for the period January 1 to May 23, 1918.

In determining your tax liability as stated herein your claim for the calendar year 1919 for refund (amount not stated) has been carefully considered and in the event that you do not take an exception to the adjustments as outlined in the accompanying schedules, your claim will be rejected.

A carbon of this letter has been mailed to Patterson, Teele and Dennis in accordance with the authorization contained in your power of attorney dated March 22, 1924 running to them, which is on file in this office.

A waiver which will expire December 31, 1927, is on file for the years 1918 to 1921 inclusive.

15 Herman C. Fleitmann, Year Ended December 31, 1919.

SCHEDULE 1.

Net Income.

Net Income as disclosed by Schedule 1.....	\$200,007.88
Bureau letter April 8, 1926, as corrected (No changes).....	200,007.88

SCHEDULE 2.

Block.	Revenue agents' report and Bureau letter April 8, 1926.	Additions and deductions.	Corrected.
B.....	\$58,369.44	.....	\$58,369.44
C.....	13,851.58	-3,640.00	10,211.58
D.....	32,398.51	.....	32,398.51
G.....	1,206.10	.....	1,206.10
H.....	\$105,825.63	.....	\$102,185.63
I.....	79,596.05	.....	79,596.05
J.....	26,229.58	.....	22,589.58
K (a).....	172,896.31	-3,640.00	176,536.31
K (b).....	281.90	.....	281.99
K (c).....	600.00	.....	600.00
	\$200,007.88	.....	\$200,007.88

The above adjustment of \$3,640.00 on account of dividends, between Block C and K by which the income subject to normal tax was apparently overstated by this sum, is al-

lowed in accordance with contentions made in protest of May 3, 1926, Items 9 and 10, page 4.

SCHEDULE 3.

Computation of Tax, 1919.

Total net income Schedule 2.....		\$200,007.88
Less:		
Exemption.....	\$2,200.00	
Dividends.....	176,536.31	
Interest U. S. Bonds.....	281.99	
Amount subject to 1918 Normal Tax.....	600.00	
		<u>179,618.30</u>
Income subject to normal tax.....		\$20,389.58
Tax 4% on \$4,000.00.....	\$160.00	
Tax 8% on 16,389.58.....	1,311.17	
Tax 12% on 600.00.....	72.00	
		<u>1,543.17</u>
Surtax.....		<u>77,514.73</u>
Total tax assessable.....		\$79,057.90
Previously assessed: Account #325,752.....		<u>64,467.13</u>
Additional tax to be assessed.....		\$14,590.77

SCHEDULE 4.

Net Income.

	Year ended December 31, 1920.
Net income as disclosed by Bureau letter, April 8, 1926, Schedule 2.....	\$205,729.49
As corrected.....	<u>182,550.49</u>
Deduction: Dividends Seaboard Mills Company.....	\$23,179.00

SCHEDULE 5.

Block.	Bureau letter dated April 8, 1926.	Additions and deductions.	Corrected.
B.....	\$49,303.31	.....	\$49,303.31
C.....	59,891.21	—23,179.00	36,712.21
D.....	(13,815.65)	.....	(13,815.65)
G.....	4,981.48	.....	4,981.48
H.....	145,530.86	.....	145,530.86
J.....	245,891.21	—23,179.00	222,712.21
K.....	33,855.47	.....	33,855.47
L.....	212,035.74	—23,179.00	188,856.74
M.....	6,306.25	.....	6,306.25
N.....	205,729.49	—23,179.00	182,550.49

From a further examination of the memorandum with the return, the Revenue Agent's report and statements made in protest at May 23, 1926, it appears the taxable income in Schedule 2, Bureau letter of April 8, 1926 is overstated by \$23,179.00 in Block C. Out of the dividend of \$23,179.00,

\$7,579.00 was properly added in Block H in the Bureau letter, and the remainder of \$15,600.00 was included in Block H of the return. The sum of \$23,179.00 has accordingly been deducted from Block C.

SCHEDULE 6.

Computation of Tax, 1920.

Total net income Schedule 5.....		\$182,550.49
Less:		
Exemption.....	\$2,200.00	
Dividends.....	145,530.86	
		147,730.86
Income subject to normal tax.....		\$34,819.63
Tax at 4% on \$4,000.00.....	\$160.00	
Tax at 8% on 30,819.63.....	2,465.57	
		2,625.57
Surtax on \$182,550.49.....		67,738.27
Total Tax assessable.....		\$70,363.84
Previously assessed: Account # 333.858.....		\$43,404.83
Additional to be assessed.....		\$26,959.01

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EXHIBIT A.

Fleitmann and Company.

Computation of Distributive Shares of Corrected Income of Partnership January 1 to May 23, 1918, and Dividends Paid from Partnership Earnings May 24 to December 31, 1918.

Partners.	Corrected earnings, Jan. 1 to May 23, 1918, per amended corporation return.		Partnership earnings used in R. A. R. Amount.	Added to individual income. Amount.
	Per cent.	Amount.		
H. C. Fleitmann....	41-2/3	\$67,183.53	\$66,717.73	\$465.80
F. T. Fleitmann....	33-1/3	53,746.83	53,374.19	372.64
W. M. Fleitmann...	25	40,310.12	40,030.65	279.47
	100%	\$161,240.48	\$160,122.57	\$1,117.91
Stockholdings in common stock of Fleitmann Company.				Earnings of period January 1 to May 23, 1918 returned as corporation dividends May 24, to December 31, 1918.
	Average percentage over period.	May 24, 1918.	Dec. 31, 1918.	
H. C. Fleitmann....	49.4	\$663,000.00	\$913,000.00	
F. T. Fleitmann....	28.9	421,000.00	500,000.00	
W. M. Fleitmann...	21.7	285,000.00	407,000.00	
	100%	\$1,369,000.00	\$1,820,000.00	

(Here follows Exhibit B, side folios 19, 20, 21, 22, 23, 24, 25, 26, and 27.)

EXHIBIT B.

Fleitmann & Co., Inc.

Income Available for Dividends Paid During Calendar Year 1920

Deductions.

	Special paid in surplus	Undivided earned surplus	Restricted earnings	Accrued common dividend less paid out of accrual	Preferred dividends paid out of income calendar year 1920	Federal tax accrued (estimated)	Income.	
							Operating	Dividends
Balance brought forward from previous period...		126,122.73						
Preferred Dividend paid Jan. 2.....		15,000.00						
Income—January.....						48,882.35	11,832.35	37,050.00
Deductions—January.....				11,958.33		543.03	12,501.36	
						36,380.99		
Income—February.....						11,832.35	11,832.35	
						48,213.34		
Deductions—February.....				11,958.33		543.03	12,501.36	
						35,711.98		
Common Dividend paid Feb. 27.....		51,779.81*						
Income—March.....						11,832.35	11,832.35	
						47,544.33		
Deductions—March.....				11,958.33		543.02	12,501.35	
						35,042.98		
Common Dividend paid March 12, \$145,500.00..	48,282.09*	59,314.92*		35,874.99*				
Income—April.....						13,786.35	11,832.35	1,954.00
						48,829.33		
Deductions—April.....				11,958.33	15,000.00	543.02	27,501.35	
20 Amounts forward.....	48,282.09*			11,958.33	15,000.00	2,172.10	21,327.98	47,329.40
Amounts brought forward.....	48,282.09*			11,958.33	15,000.00	2,172.10	21,327.98	39,004.00
Income—May.....							45,957.35	11,832.35
						67,285.33		
Deductions—May.....				11,950.33		543.02	12,501.35	
						54,783.98		
Income—June.....						341,501.85	11,832.35	329,759.50
						396,375.83		
Deductions—June.....				1,1958.33		543.02	12,501.35	
						383,874.48		
Common Dividend paid June 12, \$123,000.00....				35,874.99*			87,125.01*	
						296,749.47		
Income—July.....						13,932.35	11,832.35	1,200.00
						389,781.82		
Deductions—July.....				11,958.33	15,000.00	543.02	27,501.35	
						282,280.47		
Income—August.....							11,832.35	
						294,112.82		
Deductions—August.....				11,958.33		543.02	12,501.35	
21 Amounts forward.....	48,282.09*			23,916.66	30,000.00	4,344.18	281,611.47	94,658.80
Amounts brought forward.....	48,282.09*			23,916.66	30,000.00	4,344.18	281,611.47	404,988.50

Amounts brought forward.....	48,282.09*			11,958.33	15,000.00	2,172.10	21,327.98	47,329.40	39,004.00
Income—May.....							45,957.35	11,832.35	34,125.00
							67,285.33		
Deductions—May.....				11,950.33		543.02	12,501.35		
							54,783.98		
Income—June.....							341,501.85	11,832.35	329,759.50
							396,375.83		
Deductions—June.....				1,1958.33		543.02	12,501.35		
							383,874.48		
Common Dividend paid June 12, \$123,000.00....				35,874.99*			87,125.01*		
							296,749.47		
Income—July.....							13,932.35	11,832.35	1,200.00
							389,781.82		
Deductions—July.....				11,958.33	15,000.00	543.02	27,501.35		
							282,280.47		
Income—August.....							11,832.35	11,832.35	
							294,112.82		
Deductions—August.....				11,958.33		543.02	12,501.35		
21 Amounts forward.....	48,282.09*			23,916.66	30,000.00	4,344.18	281,611.47	94,658.80	404,988.50
Amounts brought forward.....	48,282.09*			23,916.66	30,000.00	4,344.18	281,611.47	94,658.80	404,988.50
Income—September.....							14,232.35	11,832.35	2,400.00
							295,843.82		
Deductions—September.....				11,958.34		543.02	12,591.36		
							283,342.46		
Common Dividends paid Sept. 13, \$82,000.00....				35,875.00*			46,125.00*		
							237,217.46		
Income—October.....							11,832.35	11,832.35	
							249,049.81		
Deductions—October.....				11,958.34	15,000.00	543.02	27,501.36		
							221,548.45		
Income—November.....							143,457.34	11,832.34	131,625.00
							365,005.79		
Deductions—November.....				11,958.34		543.02	12,591.36		
							352,504.43		
Income—December.....							40,701.34	11,832.34	28,949.00
							393,285.77		
Deductions—December.....			100,000.00	11,958.34		543.02	112,501.36		
							280,784.41		
Common Dividend paid Dec. 10, \$20,500.00.....				20,500.00*					
	48,282.09*		100,000.00	15,375.02	45,000.00	6,616.26	280,784.41	141,988.18	567,962.50
Transfer.....				15,375.02			15,375.02		
							296,159.43		

[* Red in copy.]

EXHIBIT B

Fleitmann & Co., Inc.

Income Available for Dividends May 24—December 31, 1918

Deductions

1918	Common dividends paid out of special paid in surplus	Restricted earnings	Accrued common dividend less paid out of income	Preferred dividends paid out of income	Estimated federal tax accrued	Total for month	Income		
							Total for month	Operating	Dividends
Income May 24—31.....	.....	.....	.....	.....	.....	6,712.39	6,712.39	6,712.39	.....
Deductions May 24—31.....	.....	.....	2,129.55	.....	451.73	2,581.28	.....	.....	.....
Income available May 31.....	.....	.....	.....	.....	.....	4,131.11	.....	.....	.....
Income—Month of June.....	.....	.....	.....	.....	.....	53,894.86	53,894.86	13,922.36	39,962.50
						58,015.97			
Deductions—Month of June.....	.....	.....	9,298.33	.....	1,693.96	10,992.29	.....	.....	.....
Income available June 30.....	.....	.....	.....	.....	.....	47,023.68	.....	.....	.....
Income July 1—3.....	.....	.....	.....	.....	.....	1,392.24	.....	1,392.24	.....
						48,415.92			
Deductions July 1—3.....	.....	.....	629.60	30,000.00	169.40	30,799.00	.....	.....	.....
Income available July 3.....	.....	.....	.....	.....	.....	17,616.92	.....	.....	.....
Common Dividend paid July 3.....	32,380.00	.....	.....	.....	.....	.....	.....	.....	.....
Income July 4—31.....	.....	.....	.....	.....	.....	12,530.12	13,922.36	12,530.12	.....
						30,147.04			
Deductions July 4—31.....	.....	.....	8,814.40	.....	1,524.56	41,137.96	.....	.....	.....
Income available July 31.....	.....	.....	.....	.....	.....	19,808.00	.....	.....	.....
Income—Month of August.....	.....	.....	.....	.....	.....	13,922.36	13,922.36	13,922.36	.....
						33,730.44			
Deductions—Month of August.....	.....	.....	9,444.16	.....	1,693.96	11,138.12	.....	.....	.....
Income available August 31.....	.....	.....	.....	.....	.....	22,592.32	.....	.....	.....
Income—Month of September.....	.....	.....	.....	.....	.....	13,922.36	13,922.36	13,922.36	.....
						36,514.68			
Deductions—Month of September.....	.....	.....	9,444.16	.....	1,693.96	11,138.12	.....	.....	.....
Income available September 30.....	.....	.....	.....	.....	.....	25,376.56	.....	.....	.....
Income September 30—October 1.....	.....	.....	.....	.....	.....	2,418.08	.....	464.08	1,954.00
						27,794.64			
Deductions September 30—October 1.....	.....	.....	314.80	15,000.00	56.46	15,371.26	.....	.....	.....
Common dividend paid October 1.....	.....	.....	16,190.00*	.....	.....	.....	.....	.....	.....
Income available October 1.....	.....	.....	.....	.....	.....	12,423.30	.....	.....	.....
Income October 2—October 31.....	.....	.....	.....	.....	.....	13,458.28	15,876.36	13,458.28	.....
Amounts forward.....	32,380.00	.....	23,385.00	45,000.00	7,284.03	76,987.77	25,881.66	118,240.69	76,324.19
23 Amounts brought forward.....	32,380.00	.....	23,385.00	45,000.00	7,284.03	76,987.77	25,881.66	118,240.69	76,324.19
Deductions October 2—October 31.....	.....	.....	9,478.79	.....	1,637.50	26,487.55	11,116.29	.....	.....
Income available October 31.....	.....	.....	.....	.....	.....	14,765.37	.....	.....	.....
Income—Month of November.....	.....	.....	.....	.....	.....	48,047.36	48,047.36	13,922.36	34,125.00
						62,912.73			
Deductions—Month of November.....	.....	.....	10,616.65	.....	1,693.96	12,310.61	.....	.....	.....
Income available November 30.....	.....	.....	.....	.....	.....	50,502.12	.....	.....	.....
Income December 1—December 23.....	.....	.....	.....	.....	.....	112,243.78	10,673.78	.....	102,570.00

Income July 4—31.....							12,530.12	13,922.36	12,530.12	
Deductions July 4—31.....			8,814.40		1,524.56	41,137.96	30,147.04 10,338.96			
Income available July 31.....							19,808.00			
Income—Month of August.....							13,922.36	13,922.36	13,922.36	
Deductions—Month of August.....			9,444.16		1,693.96	11,138.12	33,730.44 11,138.12			
Income available August 31.....							22,592.32			
Income—Month of September.....							13,922.36	13,922.36	13,922.36	
Deductions—Month of September....			9,444.16		1,693.96	11,138.12	36,514.68 11,138.12			
Income available September 30.....							25,376.56			
Income September 30—October 1....							2,418.08		464.08	1,954.00
Deductions September 30—October 1..			314.80	15,000.00	56.46		27,794.64 15,371.26			
Common dividend paid October 1.....			16,190.00*							
Income available October 1.....							12,423.30			
Income October 2—October 31.....							13,458.28	15,876.36	13,458.28	
23 Amounts forward.....	32,380.00		23,385.00	45,000.00	7,284.03	76,987.77	25,881.66	118,240.69	76,324.19	41,916.50
23 Amounts brought forward.....	32,380.00		23,385.00	45,000.00	7,284.03	76,987.77	25,881.66	118,240.69	76,324.19	41,916.50
Deductions October 2—October 31....			9,478.79		1,637.50	26,487.55	11,116.29			
Income available October 31.....							14,765.37			
Income—Month of November.....							48,047.36	48,047.36	13,922.36	34,125.00
Deductions—Month of November....			10,616.65		1,693.96	12,310.61	62,912.73 12,318.61			
Income available November 30.....							50,502.12			
Income December 1—December 23....							113,243.78		10,673.78	102,570.00
Deductions December 1—December 23			7,785.26		1,299.70		163,745.90 9,984.06			
			51,765.00				154,661.84			
Common Dividends paid										
December 23.....\$126,560.00	74,794.20		51,765.80*							
Income December 24—December 31....							4,211.04	117,454.82	3,248.34	962.50
Deductions December 24—December 31		100,000.00	2,831.50		395.26	109,479.32	158,072.09 100,395.26			
	2,831.50*		2,831.50*				50,477.62			
	104,342.79	100,000.00		45,000.00	12,309.45	325,265.25		283,742.87	134,168.87	179,874.00
Minor adjustment of earnings.....							236.07	236.07	236.07	
							28,241.25	283,596.80	103,932.00	179,574.00
Income Jan. 1, 1918 to May 23, 1918 (Special Paid in surplus).....	161,240.48*									
Preferred Dividend declared Dec. 23, 1918 paid Jan. 3, 1919.....							15,000.00			
	16,697.78						48,241.55			

[*Red in copy.]

Note: After payment of Preferred Dividend and dividends totalling 7% on the Common Stock, \$100,000.00 in accordance with terms of incorporation agreement must be set aside as a special surplus to retire Preferred Stock before any further dividends may be paid out of current earnings.

EXHIBIT B.

Fleitmann & Co., Inc.

Income Available for Dividends Paid During Calendar Year 1919.

Deductions.

[illegible]

Deductions—June 1-5.....				1,769.45		988.20	137,162.18 2,757.65		
Income available June 5.....							134,404.53		
Common Dividends paid June 5 \$131,950.00...	56,897.78*	43,241.55*		{ 23,002.79* 8,807.88* }					
Income—June 6-30.....							28,260.90	27,298.40	962.50
Deductions—June 6-30.....				8,883.48		4,940.93	162,665.43 13,824.41		
							148,841.02		
26 Forward.....				75.60	15,000.00	35,574.80	148,841.02	196,548.59	66,603.50
Forward.....				75.60	15,000.00	35,574.80	148,841.02	196,548.59	66,603.50
Income—July.....							32,758.10	32,758.10	
Deductions—July.....				10,664.07	15,000.00	5,929.13	181,599.12 31,593.20		
Income available July 31.....							150,005.92		
Income—August.....							32,758.10	32,758.10	
Deductions—August.....				10,664.07		5,929.13	182,764.02 16,593.20		
Income—September.....							166,170.82 32,758.09	32,758.09	
Deductions—September.....				10,709.65		5,929.13	198,928.91 16,638.78		
Common Dividends Pd. Sept. 11, \$54,840.00...				32,113.39*			182,290.13 22,726.61*		
Income available Sept. 30.....							159,563.52		
Income—October.....							34,712.09	32,758.09	1,954.00
Deductions—October.....				10,737.56	15,000.00	5,929.13	194,275.61 31,666.69		
27 Forward.....				10,737.56	45,000.00	59,291.32	162,608.92	327,580.97	68,557.50
Forward.....				10,737.56	45,000.00	59,291.32	162,608.92	327,580.97	68,557.50
Income—November.....							91,258.09	32,758.09	58,500.00
Deductions—November.....				10,816.37		5,929.13	253,867.01 16,745.50		
Income available Nov. 30.....							237,121.51		
Income—December.....							75,876.42	32,758.09	43,118.33
Deductions—December.....			100,000.00	11,983.08		5,929.13	312,997.93 117,912.21		
Common Dividends paid Dec. 5, \$102,509.00...				33,537.61*			195,085.72 68,962.99*		
			100,000.00		45,000.00	71,149.58	126,122.73	393,097.15	170,175.83
Preferred Dividend declared Dec. 1919; Paid January 2, 1920.....							15,000.00		
*Red in copy							111,122.73		

Note: After payment of Preferred Dividend and dividends totalling 7% on the Common Stock, \$100,000.00 in accordance with terms of incorporation agreement must be set aside as a special surplus to retire Preferred Stock before any further dividends may be paid out of current earnings.

28 United States Board of Tax Appeals. Filed Sep.
24, 1930.

United States Board of Tax Appeals.
Filed Sept. 26, 1930.

Docket No. 28451.

HERMAN C. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amended Answer to Amended Petition.

The respondent, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for amended answer to amended petition, in lieu and in substitution of the answer filed January 15, 1930, to petitioner's amended petition filed December 19, 1929, admits and denies as follows:

1. Admits the statements and allegations contained in introductory paragraph and paragraph No. 1 of the amended petition heretofore referred to.

2. Admits the allegations contained in paragraph No. 2 of the amended petition heretofore referred to.

3. Admits the allegations contained in paragraph No. 3 of the amended petition heretofore referred to.

4. Denies that the respondent erred in determining or computing petitioner's tax liability for the calendar years 1919, 1920, and 1921, as alleged in corresponding paragraph of the amended petition heretofore referred to.

5. The respondent admits, denies and avers with reference to the allegations contained in paragraph No. 5 of the amended petition heretofore referred to as follows:

29 (a) Admits that the income tax returns of the petitioner for 1919, 1920 and 1921 were filed on March 15, 1920, March 15, 1921, and March 15, 1922, respectively, and that the deficiency letter proposing deficiencies for each of the above-named years was dated and mailed to the petitioner on March 14, 1927, but denies the remaining allegations contained in corresponding subparagraph of the amended petition heretofore referred to.

(b) to (m), inclusive. Denies all allegations contained in corresponding subparagraphs of the amended petition heretofore referred to.

(n) The respondent avers that the petitioner and respondent have in writing entered into three valid and binding waivers for 1919, which were accepted by the respondent and which extended the period for making assessment and collection of petitioner's income tax for 1919 to a period beyond March 14, 1927, the admitted date upon which the deficiency letter was mailed, as more particularly shown by photostatic copies of such waivers, which are hereto attached and made a part hereof and are numbered in their chronological order as Exhibits 1 to 3, respectively.

(o) The respondent avers that the petitioner and respondent have in writing entered into two valid and binding waivers for 1920, which were accepted by the respondent and which extended the period for making assessment and collection of petitioner's income tax for 1920 to a period beyond March 14, 1927, as more particularly shown by photostatic copies of such waivers, which are hereto
30 attached and made a part hereof and are numbered Exhibits 4 and 3, respectively.

(p) The respondent avers that the petitioner and respondent have in writing entered into two valid and binding waivers for 1921, which were accepted by the respondent and which extended the period for making assessment and collection of petitioner's income tax for 1921 to a period beyond March 14, 1927, as more particularly shown by photostatic copies of such waivers, which are hereto attached and made a part hereof and are numbered Exhibits 5 and 3, respectively.

6. Denies generally and specifically each and every allegation not hereinbefore admitted or qualified.

Wherefore it is prayed that the relief sought by the petitioner be denied.

(Signed)

C. M. CHAREST,
C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Of Counsel:

BRUCE A. LOW,

Special Attorney, Bureau of Internal Revenue.

NOTE.—Exhibits 1, 2 and 3 omitted here because same as Petitioner's Exhibits 2, 3 and 4, respectively, which are attached to the Statement of evidence. Exhibits 4 and 5 do not refer to the years in controversy.

United States Board of Tax Appeals.

Docket No. 28451.

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated April 20, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Waivers executed by the decedent to which the Commissioner's name was affixed by employees at the direction of persons authorized by the Commissioner to sign his name, are valid and extend the statutory period.

Richard E. Dwight, Esq., F. S. Winston, Esq., W. N. Wood, Esq., and Howe P. Cochran, Esq., for the petitioners.
Bruce A. Low, Esq., for the respondent.

The respondent determined deficiencies for calendar years and in the amounts as follows:

Year.	Amount.
1919	\$14,590.77
1920	26,959.01
1921	7,200.20
Total	<u>\$48,749.98</u>

Upon motion of counsel for petitioners the hearing in the first instance was limited to the question of whether assessment and collection of the deficiencies are barred by the statute of limitations.

Findings of Fact.

The returns of petitioners' decedent, Herman C. Fleitmann, for the calendar years 1919, 1920 and 1921 were filed, respectively, on March 15, 1920, March 15, 1921, and March 15, 1922.

On December 24, 1924, Fleitmann executed a waiver extending the time for assessment and collection of 1919 taxes "for a period of one year after the expiration of the statutory period." Commissioner Blair's name was placed on this waiver on February 8, 1926, by Albert Lewis who was then head of the personal audit division of the income tax unit and who had been authorized by Blair to sign waivers.

32 On January 22, 1926, respondent wrote to Fleitmann in regard to 1918 and 1919 returns and asked that he execute the waiver forms that were enclosed with the letter. On February 12, 1926, respondent sent a telegram to Fleitmann's attorney asking that the waivers requested in the letter of January 22, 1926, be submitted. On February 13, 1926, respondent wrote to Fleitmann asking for waivers for the years 1919 to 1921 and enclosed waiver forms with the letter. Fleitmann executed three separate waivers, all dated February 17, 1926, one for each of the years 1919, 1920 and 1921, each extending the statutory period for assessment to December 31, 1926, and providing for the additional time allowed by statute in the event of the sending of a deficiency notice before that date. Commissioner Blair's name was placed on each of these waivers by the secretary to H. B. Robinson, at Robinson's direction. Robinson was head of the audit review division in the income tax unit, and held a written authorization to sign Blair's name to waivers.

On November 5, 1926, respondent wrote Fleitmann requesting that he execute and return the waiver forms enclosed with the letter extending the limitation period for the years 1918 to 1921, inclusive. On November 8, 1926, Fleitmann executed a waiver extending the time for assessment for the years 1918 to 1921, inclusive, to December 31, 1927, and also providing for the additional time allowed by statute in the event of the sending of a deficiency notice before that date. Commissioner Blair's name was affixed to this

waiver by the secretary to H. B. Robinson at Robinson's direction.

The deficiency notice was mailed to Fleitmann on March 14, 1927.

33

Opinion.

ARUNDELL:

The effect of the first waiver, dated December 24, 1924, need not be decided as in our opinion those subsequently given are sufficient to extend the statutory period beyond the date of the deficiency notice. *Brown & Sons Lumber Co. v. Burnet*, — U. S. —, footnote 4.

The waivers dated February 17, 1926, extended the statutory period to December 31, 1926, and before that date, namely on November 8, 1926, a further waiver was given extending the time to December 31, 1927. Before the latter date the deficiency notice was mailed.

The arguments against the validity of the waivers of February 17, 1926, and November 8, 1926, are disposed of in our opinion in *Frederick T. Fleitmann*, — B. T. A. —, decided this day. In our opinion the waivers were effective to extend the time, the deficiency notice was timely sent, and assessment and collection are not barred.

This proceeding will be restored to the general calendar for hearing on the merits in due course.

34

Filed at Hearing May 28, 1931.

United States Board of Tax Appeals.

Docket No. 28451.

MARIE J. J. FLEITMANN et al., Executors of the Estate of
Herman C. Fleitmann, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation of Tax Liability.

It is hereby stipulated and agreed by and between the parties to this proceeding, by and through their respective

attorneys of record, that there is a deficiency in respect of the Federal income tax of the petitioners for the taxable year 1919 in the amount of \$14,826.50, and that an order of the Board settling the determination of said tax may be entered in accordance with this stipulation.

It is further stipulated and agreed that there is neither a deficiency nor an overpayment of tax in respect of either of the taxable years 1920 and 1921.

This stipulation is entered into without prejudice to the right of the petitioners to petition the Circuit Court of Appeals for a review of the Board's decisions in respect of the issue pertaining to the statute of limitations.

H. P. COCHRAN,
Attorney for Petitioners.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent,

35 United States Board of Tax Appeals, Washington.

Docket No. 28451.

MARIE J. J. FLEITMANN et al., Executors of the Estate of
Herman C. Fleitmann, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Board on May 28, 1931, it is

Ordered and decided that there is a deficiency in Federal income tax of the petitioners for the year 1919 in the amount of \$14,826.50.

It is further stipulated and agreed that there is neither a deficiency nor an overpayment of tax in respect of either of the years 1920 and 1921.

(Signed)

J. E. MURDOCK,
Member.

Enter.

Entered May 29, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Filed Nov. 27, 1931.

United States Board of Tax Appeals.

United States Board of Tax Appeals.

(Docket No. 17121.)

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Peti-
tioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

United States Board of Tax Appeals.

(Docket No. 28450.)

FREDERICK T. FLEITMANN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

United States Board of Tax Appeals.

(Docket No. 28451.)

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Peti-
tioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

*Stipulation for Review by Court of Appeals of District of
Columbia.*

Whereas Frederick T. Fleitmann, petitioner in Docket
#28450, is a resident and inhabitant of Switzerland and is

not an inhabitant of any circuit of the United States Circuit Court of Appeals, and

Whereas all three of the above-entitled actions involve questions of similar character,

Therefore it is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the decisions of the Board of Tax Appeals in the
37 three cases above named may be reviewed by the Court of Appeals of the District of Columbia.

(Signed)

HOWE P. COCHRAN,

Attorney for Petitioner.

(Signed)

C. M. CHAREST.

Dated this 7th day of November, 1931.

38 United States Board of Tax Appeals. Filed Nov.
27, 1931.

Court of Appeals of the District of Columbia.

United States Board of Tax Appeals.

(Docket No. 28451.)

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition for Review of Decision of the United States Board of Tax Appeals to the Court of Appeals of the District of Columbia.

To the Honorable Judges of the Court of Appeals of the District of Columbia:

Your petitioners, Marie J. J. Fleitmann and Thomas Crimmins, Executors of the Estate of Herman C. Fleitmann, Deceased, by their attorney, Richard E. Dwight, respectfully show:

I. This is a proceeding for review by the Court of Appeals of the District of Columbia of a decision by the United States Board of Tax Appeals entered on the 29th day of

May, 1931, pursuant to the Board's findings of fact and opinion promulgated on the 20th day of April, 1931, re-determining against your petitioners, as Executors of the Estate of Herman C. Fleitmann, deceased, a deficiency in income and profits taxes for the year 1919, in the amount of \$14,826.50.

39 II. Herman C. Fleitmann died on May 24, 1930.

Letters testamentary were issued by the Surrogate Court for the County of New York, State of New York to your petitioners, the executors named in the last will and testament of said Herman C. Fleitmann. Your petitioners are still serving in the capacity of Executors of the Estate of Herman C. Fleitmann and have not been discharged.

III. This appeal to the Court of Appeals of the District of Columbia is taken pursuant to a stipulation entered into between the parties hereto in accordance with the terms of Paragraph (d) of Section 1002 of the Revenue Act of 1926.

IV. Herman C. Fleitmann duly filed his income and profits tax return for the year 1919, in the office of the Collector of Internal Revenue for the Third Collection District of the State of New York on March 15, 1920. Pursuant to said return taxes were assessed against and paid by said Herman C. Fleitmann. After such payments the respondent asserted and proposed to assess and collect from said Herman C. Fleitmann additional taxes for the year 1919, whereupon said Herman C. Fleitmann appealed to the United States Board of Tax Appeals and prayed for a redetermination and cancellation of his liability for further taxes for the year 1919. At the hearing on this appeal your petitioners were substituted for said Herman C. Fleitmann, deceased.

40 The point at issue presented before the United

States Board of Tax Appeals by this appeal was whether or not the statute of limitations had run against the assessment and/or collection of these taxes. That issue depended in turn for its solution on the question of the validity or invalidity of certain waivers. These waivers were executed by Herman C. Fleitmann and the name of the Commissioner was placed thereon by stenographers in the Bureau of Internal Revenue. Under the name of the Commissioner these stenographers wrote the initials H. B. R. H. B. R., are the initials of Henry B. Robinson, a Chief

of Division in the Bureau of Internal Revenue. Mr. Robinson held a written Power of Attorney authorizing him to sign the name of the Commissioner to waivers. None of said stenographers held authority from the Commissioner of Internal Revenue to sign his name to waivers in his behalf and this practice was carried on behind the back of the Commissioner and without his knowledge or consent. Nor were such third-hand signatures of the Commissioner of Internal Revenue executed in the immediate presence of or at the specific and particular request of Henry B. Robinson. Nor was any evidence introduced to show the dates on which the name of the Commissioner of Internal Revenue was affixed to certain waivers, whether before or after the statute of limitations had run.

VI. On April 20, 1931, the United States Board of Tax Appeals filed its findings of fact and opinion declaring the waivers to be valid and effective waivers and holding that neither the assessment nor collection of the taxes in question was barred by the statute of limitations, and on May 29, 1931 the said Board entered a formal order stating that there was a deficiency for the year 1919 in the amount of \$14,826.50.

VII. The errors committed by the United States Board of Tax Appeals upon which your petitioners rely as the basis of this proceeding are as follows:

1. On the evidence the Board erred in entering judgment for the Commissioner.

2. On the evidence the Board erred in approving and redetermining the deficiency found by the Commissioner.

3. On the evidence the Board erred in failing to hold that the assessment of all further taxes against Herman C. Fleitmann for the year 1919 was barred at the date of the mailing of the deficiency notice to him on March 14, 1927.

4. On the evidence the Board erred in failing to hold that the collection of all taxes asserted against Herman C. Fleitmann for the year 1919 was barred at the date of the decision of the case by the United States Board of Tax Appeals.

5. The Board erred in failing to hold that under the evidence the burden of proof was on the respondent in this case to prove that the period of limitations had been extended by valid waivers.

6. The Board erred in failing to hold that there were no sufficient consents in writing which would validate the assessment and/or collection of this tax.

42 7. The Board erred in failing to hold that the waiver executed by the taxpayer on February 17, 1926 was invalid and void for the reason that there was nothing in the evidence to show that it was ever signed by the Commissioner or someone authorized to sign in his stead prior to March 15, 1926, the date on which the statute of limitations, except for the giving of said waiver would have run.

8. The Board erred in failing to hold that the waiver executed by the taxpayer on November 8, 1926 was invalid and void for the reason that there is nothing in the evidence to show that it was ever signed by the Commissioner or someone authorized to sign in his stead prior to December 31, 1926, the date on which the statute of limitations, except for the giving of said waiver, would have run.

9. On the evidence the Board erred in failing to hold that all of the waivers relied on by the Government were invalid and void.

10. The Board erred in failing to hold that the waivers signed February 17, 1926 and November 8, 1926 were invalid and void for the reason that they were never signed by the Commissioner or anyone authorized to sign in his stead.

11. The Board erred in failing to hold that the collection of said tax was barred at dates subsequent to February 26, 1926, the date of the enactment of the Revenue Act of 1926, and that accordingly the collection was barred forever under Section 1106 (a) of that Act.

12. The Board erred in holding that "when the correspondence between the parties shows that they understood the statute to be extended there is a sufficient consent in writing."

43 13. The Board erred in holding that the consents in writing were complete when the petitioner signed and filed the waiver forms.

14. The Board erred in holding that the signing of a waiver comprised two elements: first, the discretionary duty of approval which could not be delegated by an agent, and second, the ministerial duty of signing the name of the Commissioner which could be delegated by an agent.

15. The Board erred in holding that the signing of the Commissioner's name to a waiver was a ministerial act.

16. The Board erred in holding that the duty of signing the Commissioner's name to a waiver could be delegated by an agent.

17. The Board erred in holding that under his authority Henry B. Robinson could delegate to subordinates the duty of signing the Commissioner's name to waivers.

18. The Board erred in holding that the attempted delegation to subordinates by Henry B. Robinson of the duty of signing the Commissioner's name to these waivers was a valid delegation.

19. The Board erred in holding that the evidence showed that there was no attempt on the part of Henry B. Robinson to delegate the duty of passing upon the acceptability of waivers.

20. The Board erred in holding that the evidence showed that said duty "was personally performed by Robinson and Anderson by having the waivers presented to them for decision as to their acceptability."

21. The Board erred in holding that the evidence established that "it was the practice in both Robinson's
44 and Anderson's offices for waivers to be brought to the attention of Robinson and Anderson and when they determined the waivers should be signed, the physical act of signing was delegated to employees."

22. The Board erred in holding with respect to the waivers here in question that the evidence showed "in each instance a waiver was requested by the respondent and it was pursuant to these requests that the waivers were signed and sent in by the petitioners."

23. The Board erred in not excluding all other witnesses from the room while one was testifying.

24. The findings of the Board that the waivers in question were furnished in response to letters from the respondent requesting same are not supported by the evidence.

Wherefore your petitioners pray that the Court may review the action and decision of the Board of Tax Appeals in this cause, reverse the decision of said United States Board of Tax Appeals and direct the entry of a decision by said Board in favor of your petitioners determining that there is no deficiency in income and profits taxes for the

year 1919, and that no further taxes should be assessed or collected, and awarding to your petitioner such other and further relief as to the Court may seem just and proper.

RICHARD E. DWIGHT,
RICHARD E. DWIGHT,
Attorney for Petitioners,
100 Broadway, New York City, N. Y.

45 STATE OF NEW YORK,
City of New York,
County of —, ss:

Richard E. Dwight, being first duly sworn, says that he is counsel of record in the above-named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

RICHARD E. DWIGHT.

Subscribed and sworn to before me this 24th day of November, 1931.

CHARLES J. McNALLY,
Notary Public.

Notary Public, Kings County.
Kings Co. Cl'k's No. 106, Reg. No. 2124.
N. Y. Co. Cl'k's No. 340, Reg. No. 2Mc205.
Commission expires March 30, 1932.
My commission expires — —, —.

46 Received Mar. 23, 1932, U. S. Board of Tax Appeals.

United States Board of Tax Appeals. Lodged March 23, 1932.

Filed March 25, 1932.

United States Board of Tax Appeals.

Docket No. 28451.

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Peti-
tioners,

VS.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Statement of Evidence.

At the hearings on the above-entitled cause on October 8th, 27th, and 28th, 1930 before the Honorable C. Rogers Arundell, Member of the United States Board of Tax Appeals, the following evidence was offered and received.

Appearances:

Harry Friedman, Esq., and William N. Wood, Esq., of Washington, and Richard E. Dwight, Esq., of New York, New York on behalf of the petitioners.

Mason D. Leming, Esq., Bruce A. Low, Esq., and L. H. Rushbrook, Esq. (C. M. Charest, Esq., General Counsel of the Bureau of Internal Revenue), on behalf of the Commissioner of Internal Revenue, respondent.

47 It was moved by the petitioners that in view of the death of Herman C. Fleitmann, his executors, Marie J. J. Fleitmann and Thomas Crimmins, be substituted in his stead as petitioners. Respondent concurred and it was so ordered.

A stipulation was entered into between the parties agreeing to the following facts:

The 1919 return of Herman C. Fleitmann was filed on March 15, 1920. The deficiency letter was mailed on March 14, 1927. Up to the date of hearing before the Board of Tax Appeals, no assessment of a deficiency for 1919 had been made. Petitioners rested.

Offered by respondent and received in evidence the photostatic copy of a waiver dated December 24, 1924. ("Respondent's Exhibit A.") Later the original of this waiver

was offered in evidence by the petitioners and received as petitioners' Exhibit 2.

Offered by respondent and received in evidence the photostatic copy of a waiver dated February 17, 1926. ("Respondent's Exhibit B.") Later the original of this waiver was offered in evidence by the petitioners and received as petitioners' Exhibit 3.

Offered by respondent and received in evidence the photostatic copy of a waiver dated November 8, 1926. ("Respondent's Exhibit C.") Later the original of this waiver was offered in evidence by the petitioners, and was received as petitioners' Exhibit 4. Respondent rested.

48 I might make a brief statement before introducing rebuttal testimony, and before making that statement, while I hesitate to do so, I would like to ask that the witnesses be excluded from the room.

The Member: It is not my practice to exclude witnesses unless there is some valid reason for doing it.

Mr. Friedman: The only reason for doing it is because I would like to have the testimony of these witnesses before they have heard the testimony of the other witnesses.

The Member: Who are the witnesses?

Mr. Friedman: I have Mr. Bittenger, Mr. Blair, Mr. Lucas as my witnesses, and I subpœnaed Mr. Anderson of New York, but that is not in connection with this case.

The Member: I do not believe those gentlemen are going to be influenced by what any one of them may say.

Motion denied.

Mr. Friedman: Exception.

C. Edgar Bittenger, being called by the petitioners and having been duly sworn, testified in effect as follows:

I am employed in an administrative capacity in the office of the Commissioner of Internal Revenue. I have served in such capacity for nine years. I came presumably in response to a subpœna issued to David Burnett, the Commissioner of Internal Revenue. I have brought with me the authority granted by the Commissioner David H. Blair to Henry B. Robinson to sign the name of Commissioner Blair to waivers. I have searched the records and I cannot find that such authority was granted to any other person with

the initials H. B. R. The document was thereupon offered and received in evidence as petitioners' Exhibit 1.
49 My recollection is that the Commissioner issued such authority to his responsible deputies, division chiefs and responsible field officers. I know of no such officer other than H. B. Robinson who bore the initials H. B. R.

Albert Lewis, being called by the petitioners and having been duly sworn, testified in effect as follows:

I am revenue agent in charge at Richmond, Virginia. For seventeen years I have been connected with the Bureau of Internal Revenue. From 1923 to 1927 I was head of the Personal Audit Division. I signed the name of D. H. Bair to petitioners' Exhibit 2. My initials appear under the name of the Commissioner. I signed it on February 28, 1926. I was granted authority by Commissioner Blair to execute waivers on his behalf.

Henry B. Robinson, being called by the petitioners and having been duly sworn, testified in effect as follows:

On direct examination by the petitioners:

I am and have been since May 1925 Head of the Audit Review Division of the Bureau of Internal Revenue. I did not sign the name of Commissioner Blair either to petitioners' Exhibit 3 or to petitioners' Exhibit 4. However, the waivers came from my division and I was the only one in the division with the initials H. B. R., who held authority from Commissioner Blair to sign Commissioner Blair's name to waivers.

The original waivers of December 24, 1924, February 17, 1926 and November 8, 1926 were offered and received in evidence as petitioners' Exhibits 2, 3 and 4.

50 The waivers marked petitioners' Exhibits 3 and 4 came through my division.

Counsel for respondent thereupon admitted for the purposes of the record that Mr. Robinson was the only one in his division with the initials H. B. R., who was authorized by the Commissioner to sign waivers.

Cross-examination by the respondent:

With respect to petitioners' Exhibit 3, my secretary Miss Mead placed my initials on it as well as the name of D. H. Blair.

Q. Just state under what circumstances Miss Mead placed your initials there and the name of the Commissioner? A. Under my direction after the waivers were brought to my office for examination.

Q. You instructed her to affix the name of the Commissioner and to affix your initials under that name? A. Yes.

Mr. Friedman: I object to the question as leading.

Mr. Leming: The witness is under cross examination.

Mr. Friedman: Yes, but he is a government official.

The Member: Go ahead.

* * * * *

51 Q. Mr. Robinson, there seems to be some confusion as to which one of those you state that Miss Mead signed at your direction. Will you re-examine the waivers and state particularly which ones she signed? A. They look the same signatures. I thought they were all signed by the same. This one appears, it is my recollection that is Miss Mead's signature for me.

By the Member:

Q. What exhibit are you pointing to? A. No. 3.

Miss Durivage substituted as my secretary in the absence of Miss Mead. Miss Van Amburg followed Miss Mead as my secretary and she signed petitioners' Exhibit 4.

Q. Did the three secretaries you have mentioned sign all these waivers at your request and direction? A. Yes.

At about the time those waivers were signed my duties were as follows:

I had to supervise a division of 300 members. In addition I had to hold conferences with taxpayers, handle important matters and correspondence, confer with members of the General Counsel's Office on important legal matters, advise and direct all members of my division who might

seek advice and in general carry out the instructions of the higher officers of the Bureau, which included signing many communications and, perhaps, inspecting papers and
52 documents brought to my attention or for which I called or sent for and so forth.

Q. You testified, Mr. Robinson, those waivers were signed by your three secretaries at your request and direction. I will ask you if you adopted those initials as yours, and the signing of these waivers as your own act? A. Yes, sir.

Q. And you so adopt them and approve them, and confirm them at this particular time. A. Yes.

* * * * *

Q. Mr. Robinson, when did you hear for the first time that the petitioners were attempting to repudiate or deny the validity and regularity of these waivers? A. Do you want the exact date?

Q. If you know when they first attempted to repudiate them? A. I do not recall the exact date, but it was approximately ten days ago.

* * * * *

Q. Do you know, Mr. Robinson, if these petitioners were given additional time on account of the execution of these waivers, that is, if they were given additional time in the matter of assessment and collection of the taxes in controversy? A. Yes, sir; that was the purpose for which they were signed.

53 Mr. Friedman: The question was whether he knew.
Mr. Leming: He said "Yes, sir".

Mr. Friedman: The question was whether he knew.

By Mr. Leming:

Q. Do you know as a matter of personal knowledge that the taxpayers were given additional time? A. Yes, sir.

Q. Why? A. So that careful consideration and deliberate action could be taken on the matter of the tax liability, rather than have to close it out in the best way possible before the statute of limitations would run.

Q. What was the immediate cause of the extension of time they were allowed? I will withdraw that and ask you this: Would the additional time have been allowed if these waivers had not been signed? A. No, sir.

Mr. Friedman: Does that call for a conclusion, or the witness' knowledge? Is the witness testifying from conclusions to be drawn, or his personal knowledge of the case.

Mr. Leming: I will ask the question this way:

By Mr. Leming:

Q. Mr. Robinson, do you know as a matter of personal knowledge that the taxpayers would not have been given the further time if the waivers had not been executed? A. You mean in this particular case?

Q. Yes. What would have happened if the waivers had not been executed.

54 Mr. Friedman: I object to that as calling for a conclusion of the witness. The witness is here to testify from personal knowledge and that should be the limit of his testimony.

The Member: From the form of the question, it seems to me it is directed to his personal knowledge. I do not see any objection to bring out the practice, if the questions are directed to that end.

Reframe your question and keep the record straight.

By Mr. Leming:

Q. Will you state, Mr. Robinson, what the practice was with respect to the immediate assessment and collection of taxes in connection with giving and filing of waivers? A. The practice was to notify the taxpayer or his attorneys that the necessary time in which to properly consider all matters relating to his case, unless the statute of limitations was extended, was not sufficient, and so he was given this notice and asked if they wanted to file waivers extending the statute, which was their privilege under the law, and if they would so file waivers the case was held open for the submission of whatever testimony, evidence or data was necessary, and no arbitrary or hurried action was taken with respect to that case.

* * * * *

Letters addressed to Herman C. Fleitmann and dated January 22, 1926, December 20, 1924, November 5, 1926 and February 13, 1926 were offered and received in evidence and marked Respondent's Exhibits F, G, H and J, respectively.

A telegram addressed to Martin F. Keogh, Jr., New York, N. Y., was offered and received in evidence and marked Respondent's Exhibit I. Mr. Keogh was authorized at that time to represent Herman C. Fleitmann.

55 Redirect examination by petitioners:

I saw these waivers first in February and November, 1926 because waivers were brought to me promptly upon receipt at the division. I have no recollection at this time of having seen these particular waivers in 1926. My first recollection of having seen them is this morning.

* * * * * *

Q. Then you were not present at the time these particular waivers were signed, were you? A. Present where?

Q. Present when Miss Mead or Miss Durivage and Miss Vanamburg signed these waivers? A. I was present in my office.

Q. Did you see them sign each particular waiver? A. I cannot recall seeing them signing those particular waivers, but they signed waivers in my office.

Q. But you have no recollection of having seen them sign these particular waivers, referring to petitioner's exhibits 3, 4 and 5 and 6? A. No, sir.

Q. Mr. Robinson, did you ever instruct these secretaries in writing to sign these particular waivers? A. No, sir.

Q. Did you ever instruct them orally? A. Yes.

Q. Just a minute until I finish my question—may I have that answer stricken, until I finish my question.

The Member: The answer is stricken.

By Mr. Friedman:

56 Q. Did you ever instruct them orally to sign these particular waivers, that is, your instructions referring specifically to these particular waivers here, petitioner's exhibits 3, 4, 5 and 6. A. You mean apart from any other waivers that might be there?

Q. Yes, I am referring to specific instructions to sign these waivers, your instructions referring to these waivers?

A. And these alone?

Q. And these alone, yes. A. I do not recall.

Q. Then, Mr. Robinson, when you replied to Mr. Leming's question relating to these waivers being signed by your secretaries at your direction and at your request, you did not mean to have the Board understand that you gave a specific request that these specific waivers, petitioner's exhibits 3, 4, 5 and 6 be signed? A. No, sir, no specific request.

Q. Mr. Robinson, you have testified your duties included anything that the Commissioner, anything the Commissioner would in effect direct you to do, isn't that so, you were under Commissioner Blair during the year 1926? A. Yes.

Q. And if Commissioner Blair would give you instructions you were obligated by your position to carry those instructions out. A. Yes.

Q. On January 26, 1926, Mr. Blair did give you some instructions, and I ask you to read those instructions
57 to familiarize yourself with them, referring to petitioner's exhibit No. 1. A. (Reading:) Mr. H. B. Robinson, Head Consolidated Returns Division:

"Until further notice you are hereby authorized to sign my name to all waivers which have been or may hereafter be submitted in connection with assessment for 1922 and prior years, in each case, however, your initials should appear immediately under the signature.

"Please retain this document as a part of the permanent files of the Bureau, as evidence of your authority in the matter.

"(Signed)

D. H. BLAIR,"
Commissioner."

Q. With reference to these waivers, petitioner's exhibits 3, 4, 5 and 6, were they not waivers coming within the terms of these instructions, Mr. Robinson? A. Yes, sir.

Q. And you personally did not sign those waivers. A. No, sir.

* * * * *

By Mr. Friedman:

Q. When was the first time that you knew that the case of H. C. Fleitmann, that there was such a tax case as the case of H. C. Fleitmann? A. I do not recall when I first heard it.

Q. Your best recollection is when? A. The last time I heard of it, if you want to ask me that?

58 Q. When was the last time you heard of it? A. When I was told to get the auditor ready.

Q. Do you have any recollection of having heard of it previous to that? A. No, sir.

Q. And then prior to the time I spoke to you, Mr. Robinson, which was ten days or two weeks ago, you did not know that there were waivers in the case of H. C. Fleitman? A. I did not recall there were.

Recross-examination by respondent:

About 20,000 cases were pending in my division around about November, December and February, 1926. One case might contain several returns or even several hundred returns. Several hundred waivers were coming to my desk every day.

Q. Was the physical act of signing a burdensome matter at that time? A. It was.

* * * * *

Q. When you testified in response to counsel's question that you did not sign these waivers, did you mean that you did not physically put the name and initials there? A. Yes, sir.

Redirect examination by petitioners:

I did not see all the mail that came into my division. My recollection is that I saw all the waivers that came into my division. They came to my office and almost always came to my desk as I recall. They were instructed
59 to bring them to my desk. My first recollection of having seen these particulars waivers was when they were handed to me this morning.

David H. Blair, being called by the petitioners and having been first duly sworn, testified in effect as follows:

I was Commissioner of Internal Revenue from May 27, 1921 to June 1, 1929. I do not think I have ever seen peti-

tioners' Exhibits 3 and 4 before this morning. Neither of them was signed by me personally. I signed few waivers during my term of office. I delegated authority for signing to all of the heads of division, all the collectors of internal revenue, all of the agents in charge and perhaps some others. The delegation of authority to the persons named was essential to the conduct of the Government's business. I delegated such authority to as many people as I thought advisable. I suppose I could have delegated it to everybody, but whenever it was necessary and it was suggested to me that I designate such and such a person, I did it. Those so delegated were principally men in responsible positions. It was an important matter and I took care to whom I delegated it.

Miss Rene Van Amburg, being called by the petitioners, testified in effect as follows:

Direct examination by petitioners:

Since April, 1926, I have been employed in Mr. Robinson's division of the Income Tax Unit. During that time I have served as secretary to Mr. Robinson. Miss
60 Mead, whom I succeeded, left about April 20, 1926. I signed the waiver dated November 8, 1926. (Petitioners' Exhibit 4.) I was in the next room to Mr. Robinson but I could look through the door. My desk was just outside the door. The room was separate. My salary was \$2,000.00. Mr. Robinson gave me general instructions to sign waivers. There were instructions for all waivers how they were to be handled. The instructions were not in writing.

Cross-examination by respondent:

I signed the waiver of November 8, 1926 in Docket No. 28451. (Petitioners' Exhibit 4.) I do not recall signing it specifically. The conditions under which waivers were signed by me were as follows:

Waivers were sent to us from the sections and were given to Mr. Robinson. He looked them over and put them across the desk. The waivers were actually signed in Mr. Robinson's office and at his desk. It was a double desk and Mr. Robinson would pass them across it. No particular time was set aside for their signing.

Redirect examination by petitioners:

I was given no instructions by Commissioner Blair or Commissioner Lucas to sign waivers. Mr. Robinson's general instructions were to sign the Commissioner's name and Mr. Robinson's initials after he had seen them. I do not know whether Mr. Robinson was in his office on October 1, 1926, the first of November 1926, the 20th of November 1926, or the 13th of November 1926. I have no present recollection of the circumstances under which I signed this waiver. I am testifying from my own knowledge of
61 what the practice was. All waivers were signed at Mr. Robinson's desk.

Miss Helene A. Durivage, being called as witness for petitioners and having been duly sworn, testified in effect as follows:

Direct examination by petitioners:

My position was confidential clerk but at times I substituted for Miss Mead and Miss Van Amburg.

At times I signed Commissioner Blair's name to waivers although I was never instructed by Commissioner Blair so to do. I signed petitioners' Exhibit 3. I worked in a room next to Mr. H. B. Robinson's room. I considered it a part of Mr. Robinson's office. I have no present recollection of when I signed those waivers, but I do know where. It was in Mr. Robinson's office. They were all signed there, either at his desk or at the desk next door where they could be easily handed over. I mean by next door in the secretaries office. Some of them were signed at Mr. Robinson's desk and some at the secretary's desk. I also signed Mr. Robinson's name to outgoing correspondence. I signed a substantial proportion of such correspondence. The regular secretaries of Mr. Robinson participated in signing Mr. Robinson's name to correspondence. Waivers were the only documents to which I signed the Commissioner's name. I never had any written instructions from Mr. Blair or Mr. Robinson about signing Mr. Blair's name to waivers. I have no present recollection of when I signed the waiver
62 in question. Mr. Robinson signed a great many waivers. The door between Mr. Robinson's office and my room was always open. From my desk I

could look through and see Mr. Robinson. It was scarcely ten feet from my desk to Mr. Robinson's desk. If I took one step I could hand something to him. That is how close he was to me. You could reach it by taking one step and handing anything you wanted. Mr. Robinson would hand me waivers in bunches and I would sign them either at his desk or at my own desk. When I was leaning over my desk and signing documents it was impossible for Mr. Robinson to see what I was doing. Mr. Robinson would give me waivers to sign. I would not take them off of his desk unless I knew he had reviewed them. I would not sign waivers that he had not approved and I would not expect him to stand over me. So I signed waivers from time to time when Mr. Robinson was not present and could not see me doing the work. Petitioners' Exhibit 3 might have been so signed. It was not Mr. Robinson's practice to come into my room and watch me sign waivers. During the time that Mr. Robinson had conferences with taxpayers' representatives the door to my room was never closed.

Cross-examination by respondent:

Q. I will ask you whether or not you ever signed a waiver with the name of Mr. Blair thereon and Mr. Robinson's initials in which you were not authorized to do so by Mr. Robinson? A. No.

Q. When you explained at the time the waivers were actually signed in the little outer office, was that the usual custom or the exception? A. It was the exception.

63 Redirect examination by petitioners:

Petitioners' Exhibit 3 was signed in either one of the two offices but I do not know which one. Miss Van Amburg signed in front of Mr. Robinson and Miss Mead signed along the same line as I did. Miss Van Amburg sat at Mr. Robinson's desk. Miss Van Amburg signed petitioners' Exhibit 4. Miss Van Amburg told me Mr. Robinson did not want her to sign in the secretary's room so she would always have to go in Mr. Robinson's office. If Miss Van Amburg had several waivers to sign and she would be in there (Robinson's office) for quite a while she would have to call me to relieve her. By several I might mean several hundred. But if there were only five waivers to sign Mr. Robinson would

sign them himself. If there were twenty to sign I don't know whether he would sign them himself or not. And I don't know whether Miss Van Amburg would call me whether she had five, twenty or one hundred waivers to sign.

Petitioners and respondent agreed that the case was closed.

Counsel for respondent offered a motion to the effect that pursuant to a stipulation entered into between the parties this case be reopened permitting the consideration in all three cases of evidence offered in any of them.

On this motion the Member ruled as follows:

“And that case (Docket #28451) will be reopened and the testimony in that case, as far as applicable, will be considered in connection with the case of Frederick T. Fleitmann, Docket 28450 and Herman C. Fleitmann, 64 Docket No. 17121, and the testimony heretofore offered in the case of Herman C. Fleitmann, together with the testimony to be offered in that case and the case of Frederick T. Fleitmann, Docket 28450, will be considered in connection with all three cases.”

The above and foregoing statement of evidence together with exhibits appended hereto contain all the evidence introduced before the Board material to a consideration of the assignments of error as set forth in the petitioners' petition for a review of the decision entered herein by the United States Board of Tax Appeals.

It is hereby agreed that said statement as made may be approved by the Board of Tax Appeals without further notice to any party hereto, and that when so approved may be filed in the Clerk's office and become a part of the record for the purpose of the petition for review in said cause filed by Marie J. J. Fleitmann and Thomas Crimmins, Executors of the Estate of Herman C. Fleitmann, Deceased, Petitioners.

HOWE P. COCHRAN,
Attorney for Petitioners.

C. M. CHAREST,
*General Counsel, Bureau of Internal
Revenue, Attorney for Respondent.*

Dated this 22 day of March, 1932.

65 The aforesaid statement of evidence in the petition for review of Marie J. J. Fleitmann and Thomas Crimmins, Executors of the Estate of Herman C. Fleitmann, Deceased, Petitioners, vs. Commissioner of Internal Revenue, Respondent, is hereby approved and signed and ordered to be made of record in the above-entitled cause this 25 day of March 1932.

C. ROGERS ARUNDELL,
Member United States Board of Tax Appeals.

66 PETITIONER'S EXHIBIT 1.

Filed Oct. 8, 1930.

Docket 28451.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

January 26, 1926.

Mr. H. B. Robinson,
Head Consolidated Returns Division:

Until further notice, you are hereby authorized to sign my name to all waivers which have been or may hereafter be submitted in connection with assessments for 1922 and prior years. In each case, however, your initials should appear immediately under this signature.

Please retain this document as a part of the permanent files of the Bureau as evidence of your authority in the matter.

D. H. BLAIR,
Commissioner.

(Here follow Petitioner's Exhibits Nos. 2, 3, and 4, side folios 67, 68, and 69.)

Ex 2

(14.55M)
As amended 1924

27 Pg 9
APR
RH

IT:CA:2112:10

Original Statute expires in March
Examined and found acceptable for
New York, March 24, 1925
Tax of 13 476.
(Date)

STAMPED
U. S. BOARD OF TAX
APPEALS
DOCKET NO. 28451
Petitioner's Exhibit
Oct. 8, 1930

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of existing Internal Revenue Laws,
Herman C. Fleitmann a taxpayer,
of New York, N. Y. and the Commissioner
of Internal Revenue, hereby consent to extend the period prescribed by
law for a determination, assessment, and collection of the amount of
income, excess profits, or war-profits taxes due under any return made
by or on behalf of said taxpayer for the years 1919
under the Revenue Act of 1924, or under prior income, excess-profits,
or war-profits tax Acts, or under Section 38 of the Act entitled "An
Act to provide revenue, equalize duties, and encourage the industries
of the United States, and for other purposes", approved August 5, 1909.
This waiver is in effect from the date it is signed by the taxpayer and
will remain in effect for a period of one year after the expiration of
the statutory period of limitation within which assessments of taxes
may be made for the year or years mentioned, or the statutory period
of limitation as extended by Section 277 (b) of the Revenue Act of 1924,
or by any waivers already on file with the Bureau.

Herman C. Fleitmann
Taxpayer

RECORDED

APPROVED

FEB - 8 1925

By DATE

DISTRIBUTION CENTER
FEB 17 1925
SECTION 21

DEC 30 1924

CLAIMS CONTROL
SECTION

D. H. Blair
Commissioner
COMMISSIONER OF INTERNAL REVENUE

If this waiver is executed on behalf of a corporation, it must be
signed by such officer or officers of the corporation as are empowered
under the laws of the State in which the corporation is located to sign
for the corporation, in addition to which, the seal, if any, of the
corporation must be affixed.

Original waiver Statute expires March 14-1925
Examined & found acceptable for Tax of 13 476.
APR RH

INCOME AND PROFITS TAX WAIVER

FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922

IT:CR:A
CCB

February 17, 1926.

In pursuance of the provisions of existing Internal Revenue

Laws Herman C. Fleitmann, a taxpayer

of New York, N. Y. and the
Commissioner of Internal Revenue hereby waive the time prescribed by law
for making any assessment of the amount of income, excess-profits, or
war-profits taxes due under any return made by or on behalf of said tax-

payer for the year (or years) 1919
under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid
shall remain in effect until December 31, 1926, and shall then expire
except that if a notice of a deficiency in tax is sent to said taxpayer by
registered mail before said date and (1) no appeal is filed therefrom
with the United States Board of Tax Appeals then said date shall be ex-
tended sixty days, or (2) if an appeal is filed with said Board then said
date shall be extended by the number of days between the date of mailing
of said notice of deficiency and the date of final decision by said Board.

AFFIX
SEAL
HERE

H. C. Fleitmann
Taxpayer

By _____

W. H. Blair
Commissioner

If this waiver is executed on behalf of a corporation, it must
be signed by such officer or officers of the corporation as are empowered
under the laws of the State in which the corporation is located to sign
for the corporation, in addition to which, the seal, if any, of the
corporation must be affixed.

QSTAMPED
U. S. BOARD OF TAX APPEALS
DOCKET NO. 28451
Oct. 8, 1932
Petitioner's Exhibit 4.

INCOME AND PROFITS TAX WAIVER

FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1923

IT:CR; W-5
SMC

Q 5-23-21

NOV 10 1926
HEAD OF DIVISION
November 8th 1926

10410
none

In pursuance of the provisions of existing Internal Revenue

Laws. Mr. Herman C. Fleitmann. taxpayer.

of New York, New York and the

Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said tax-

payer for the year (or years) 1918 to 1921, inclusive under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

1421

Herman C. Fleitmann
Taxpayer

By _____

D. H. Blair
Commissioner

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

W.E.

70

RESPONDENT'S EXHIBIT F.

Filed Oct. 8, 1930.

Docket 28451.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:PA:PYA. ARM.

(Stamped:) Jan. 22, 1926.

Mr. Herman C. Fleitmann,
356 4th Avenue,
New York, N. Y.

SIR:

Reference is made to your 1918 and 1919 income tax returns, Forms 1040.

The question involved is the adjustment of your income due to the denial of personal service classification to the Seaboard Mills, Incorporated.

The records of this office show that the denials of personal service classification has been protested by the Corporation, the case now being under consideration by the U. S. Board of Tax Appeals.

It appears that your returns have been adjusted on the basis that the corporation was not entitled to the classification as a personal service corporation and allowances have been made to you for the years 1918 and 1919 and on a basis which you yourself have been contesting through the corporation.

Under the circumstances, it will be necessary to reaudit your returns pending the final adjustment of the corporation returns and to assess the taxes found due based upon income received by you from the Seaboard Mills, Incorporated, as having been received from a personal service corporation.

The statute of limitations will presently bar any assessment of additional taxes against you for these years. The Bureau desires to make assessment or formal determination of deficiency only after careful consideration of the

case. Waiver forms extending the statutory period of limitations are, therefore, enclosed for your use.

If you desire that assessment be withheld pending the final determination of the status of the corporation, you are requested to execute these waivers, and return them to this office within ten days from the date of this letter.

Reference should be made in your reply to the symbols IT:PA:PYA:ARM.

Respectfully,

C. R. NASH,
Assistant to the Commissioner,
By A. R. McMANNIS,
Chief of Section.

1 copy of letter & waiver sent to Wilner & Dwight & 1 copy 1/25/26.

Await his answer before filing waivers.

Last day Jan. 31, 1926.

Enclosures: Waiver forms.

71

RESPONDENT'S EXHIBIT G.

Filed Oct. 8, 1930.

Docket 28451.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:CA:2112:10.

(Stamped:) Dec. 20, 1924.

Mr. Herman C. Fleitmann,
356 Fourth Avenue,
New York, N. Y.

SIR:

Reference is made to your income tax returns for the years 1918 and 1919.

You are advised that the records of this office indicate that a waiver had been filed for the year 1918, extending for a year, the time within which assessments may be made.

Inasmuch as the time as extended by the waiver for 1918 is about to expire, you are requested to sign the enclosed Form of Waiver for 1918, and an additional waiver for the year 1918, in order to avoid the necessity of making an assessment prior to the consideration of all the information submitted.

In view of the fact that an audit of your 1919 return may indicate an overassessment, you are advised that in order to protect your interest, a claim for refund on Form 843 should be filed with the Collector of Internal Revenue for your district. The claim should set forth the basis upon which refund is claimed, as set forth in this letter.

The effect of signing a new waiver for 1918 is to extend for the period of one year, the time as extended by waivers previously on file within which assessments may be made.

You are requested to forward the enclosed forms of waiver within ten days from the date of this letter.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner,
By JOHN G. REMEY,
Chief of Section.

Enclosures: Waivers.

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RESPONDENT'S EXHIBIT H.

Filed Oct. 8, 1930.

Docket 28451.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:CR:G-5. SMC.

(Stamped:) Nov. 5, 1926.

(Stamped:) Nov. 6, 1926.

Mr. Herman C. Fleitmann,
356 Fourth Avenue,
New York, N. Y.

SIRS:

An examination of your case indicates that the period of limitations prescribed by law or as extended by a waiver

now on file, will presently expire and bar any additional assessment against you for the calendar years 1918 to 1921, inclusive, unless you consent to extend further the period of limitation. It is desired to give you an opportunity to present any evidence or contentions relative to the determination of your correct tax liability, but the Bureau will be obliged to protect the interests of the Government by notifying you of its final determination of any deficiency unless you furnish waivers in proper form.

It is, therefore, suggested that you execute and return to this office within ten days from the date of this letter the enclosed forms of waiver by which you will note that you and your affiliated companies separately agree to an extension until December 31, 1927, of the statutory period of limitations within which additional tax may be assessed for the years mentioned.

Respectfully,

C. R. NASH,
Assistant to the Commissioner,
By W. TUNGATE,
Chief of Section.

Enclosures: Waivers.

73

RESPONDENT'S EXHIBIT I.

Filed Oct. 8, 1930.

Docket 28451.

Telegram.

Treasury Department, Washington.

Office of Internal Revenue.

IT:PA:PYA. ARM.

(Stamped:) Feb. 10, 1926.

(Stamped:) Feb. 10, A. M. 10:17.

Martin J. Keogh, Jr.,
356 Fourth Avenue,
New York, New York:

See office letter January Twenty Second Submit Nineteen Eighteen and Nineteen waivers bearing personal sig-

nature Herman C. Fleitmann by February Twelfth Form Eight Seven Two A.

C. R. NASH,
Assistant to the Commissioner.

GL-F.

74

RESPONDENT'S EXHIBIT J.

Filed Oct. 8, 1930.

Docket 28451.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:CR:A. CCB.

(Stamped:) Feb. 13, 1926.

Herman C. Fleitmann,
356 Fourth Avenue,
New York, N. Y.

SIRS:

An examination of your case indicates that the period of limitations prescribed by law or as extended by a waiver now on file, will presently expire and bar any additional assessment against you for the calendar year(s) 1919 to 1921 unless you consent to extend further the period of limitation. It is desired to give you an opportunity to present any evidence or contentions relative to the determination of your correct tax liability, but the Bureau will be obliged to protect the interests of the Government by notifying you of its final determination of any deficiency or by making an immediate assessment of such deficiency under Section 274(d) of the Revenue Act of 1924 unless you furnish waivers in proper form.

It is, therefore, suggested that you execute and return to this office within five days from the date of this letter the enclosed forms of waiver by which you will note that you and your affiliated companies separately agree to an extension until December 31, 1926, of the statutory period of

limitations within which additional tax may be assessed for the years mentioned.

Respectfully,

C. R. NASH,
Assistant to the Commissioner,
By F. R. LEARY,
Chief of Section.

Enclosures: Waivers (8).

75 United States Board of Tax Appeals. Filed
Mar. 29, 1932.

United States Board of Tax Appeals.

Docket No. 28451.

MARIE J. J. FLEITMANN & THOS. CRIMMINS, Executors of the
Estate of Herman C. Fleitmann, Deceased, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe for Record.

(Filed — — —, — — —.)

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals of the District of Columbia, with reference to petition for review heretofore filed by the petitioners in the above cause, a transcript of record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the United States Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals as follows:

(a) Amended Petition.

(b) Amended answer to amended petition. Omit Exhibits 1, 2, 3, 4 and 5. Insert statement that 1, 2 and 3 are the same as Petitioners' Exhibits 2, 3 and 4 respectively.

- (3) The findings of fact and opinion of the Board of Tax Appeals.
- 76 (4) Stipulation of Tax Liability.
- (5) The decision of the Board.
- (6) Stipulation for review by the United States Court of Appeals of the District of Columbia.
- (7) The petition for review.
- (8) The statement of evidence with the following Exhibits: Petitioners' 1, 2, 3 and 4; Respondent's F, G, H, I, and J. (In all cases omit certifications.)
- (9) This Præcipe.

HOWE P. COCHRAN,
HOWE P. COCHRAN,
Attorney for Petitioners,
920 Potomac Electric Power Company Building,
Washington, D. C.

Service of a copy of the foregoing is hereby acknowledged this 29th day of March, 1932.

C. M. CHAREST,
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

The privilege of filing a counter-præcipe is hereby waived.
C. M. CHAREST.

77 Docket No. 28451.

MARIE J. J. FLEITMANN and THOMAS CRIMMINS, Executors
of the Estate of Herman C. Fleitmann, Deceased, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 76, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at

Washington, in the District of Columbia, this 12 day of April, A. D. 1932.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

78 United States Board of Tax Appeals.

Docket No. 28451.

MARIE J. J. FLEITMANN & THOMAS CRIMMINS, Executors of the Estate of Herman C. Fleitmann, Deceased, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of the evidence and transmission and delivery of the record *sur* petition for review of the above entitled proceeding in the Court of Appeals for the District of Columbia, be and hereby is extended to March 26, 1932.

(Signed)

LOGAN MORRIS,
Member.

Dated Washington, D. C., Jan. 19, 1932.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

79 United States Board of Tax Appeals.

Docket No. 28451.

MARIE J. J. FLEITMANN & THOS. CRIMMONS, Executors of the Estate of Herman C. Fleitmann, Dec'd, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioners, it is

Ordered that the time for preparation of the evidence and transmission and delivery of the record *sur* petition

for review of the above entitled proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended to April 15, 1932.

(Signed)

LOGAN MORRIS,

Member.

Dated Washington, D. C., March 17, 1932.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 5657. Marie J. J. Fleitmann and Thomas Crimmins, executors of the estate of Herman C. Fleitmann, deceased, appellants, vs. David Burnet, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Apr. 13, 1932. Henry W. Hodges, Clerk.

(2009)

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 28 1932

Court of Appeals of the District of Columbia

Ruby W. Hodges

CLERK

No. 5657.

MARIE J. J. FLEITMANN and THOMAS CRIMMINS,
Executors of the Estate of Herman C. Fleitmann, Deceased,
Petitioners,

against

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

BRIEF FOR PETITIONERS.

RICHARD E. DWIGHT,
Attorney for Petitioners.

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Court of Appeals of the District of Columbia

MARIE J. J. FLEITMANN and THOMAS
CRIMMINS, Executors of the Estate
of Herman C. Fleitmann, Deceased,
Petitioners,

against

DAVID BURNET, COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

No. 5657

BRIEF FOR PETITIONERS.

Statement of the Case.

The petitioners, as executors of the estate of Herman C. Fleitmann, deceased, seek in this Court review of a decision of the United States Board of Tax Appeals entered May 29, 1931, determining a deficiency in the income tax of Herman C. Fleitmann, deceased, for the year 1919 in the amount of \$14,826.50 (R. 23)*. This proceeding was instituted in the Board of Tax Appeals by Herman C. Fleitmann, who died before the hearing, and on motion at the hearing the petitioners were sub-

* This case, No. 5657, and Cases Nos. 5655 and 5656, were tried together and will be argued together. In the citations of the record in this brief, "R" refers to the record in this case, "R.1" to that in No. 5655, and "R.2" to that in No. 5656. By virtue of stipulations made at the hearing, the evidence in each case may, so far as applicable, be regarded as evidence in the other two (R. 43; R.1 26; R.2 42).

stituted as parties in his stead (R. 31). The findings and opinion of the Board of Tax Appeals, promulgated April 20, 1931 (R. 20), are reported in 22 B. T. A. 1234.

The case is brought to this Court by a petition for review filed November 27, 1931 (R. 25-30), pursuant to Sections 1001, 1002 and 1003 of the Revenue Act of 1926 (44 Stat. 109-110), as amended by Section 603 of the Revenue Act of 1928 (45 Stat. 873), and a stipulation as to venue (R. 24-25).

A deficiency in the tax involved in this case was asserted by the Commissioner of Internal Revenue, hereinafter called the Commissioner, in a deficiency letter (R. 12-13), which was mailed on March 14, 1927 (R. 22, 31). This proceeding was instituted in the Board of Tax Appeals to contest the correctness of the determination of deficiency (R. 5-11).

The only question presented to this Court is whether the assessment of the deficiency was barred before March 14, 1927, the date when the deficiency letter was mailed.

The return was filed on March 15, 1920 (R. 21, 31) and therefore the period of limitation upon assessment of the deficiency expired on March 15, 1925, unless it was extended by waivers (Revenue Act of 1924, §277 (a)).

The respondent relies upon the following waivers:

(1) Assessment and collection waiver dated December 24, 1924, expiring March 15, 1926, signed with the name of the Commissioner by a Mr. Lewis on February 8, 1926 (R. 21, 31-32, 33, 44).

(2) Assessment waiver dated February 17, 1926, expiring December 31, 1926, signed with the name of the Commissioner by a Miss Durivage (R. 32, 41), as follows: "D. H. Blair, Commissioner, H.B.R." (R. 21, 44).

(3) Assessment waiver dated November 8, 1926, expiring December 31, 1927, signed with the name of the Commissioner by a Miss Van Amburg (R. 32, 40), as follows: "D. H. Blair, Commissioner, H. B. R." (R. 21-22, 44).

Commissioner Blair testified that he did not sign either the waiver of February 17, 1926, or that of November 8, 1926, and that he did not think he had ever seen either of these waivers before the trial (R. 39-40). There is no direct testimony with respect to the circumstances attending the actual signing of either of these two waivers. The evidence relied upon by the respondent to show these circumstances is entirely evidence of custom.

Miss Durivage and Miss Van Amburg, who respectively signed the waivers of February 17, 1926, and November 8, 1926, on behalf of the Commissioner, were secretaries to Henry B. Robinson (R. 34, 40, 41), whose initials appear on the waivers (R. 33, 44; R.² 47). Mr. Robinson was head of a division of the Bureau of Internal Revenue, and the waivers were signed in his division (R. 33).

At the times when these waivers were signed, there was in force an order of the Commissioner which was in part as follows:

"Any waiver received from a taxpayer shall be referred to the head of division in which the case is under consideration, who will determine whether it is acceptable" (R.² 22, 74).

Mr. Robinson had written authority from the Commissioner, as follows:

"Until further notice, you are hereby authorized to sign my name to all waivers which have been or may hereafter be submitted in connection with assessments for 1922 and prior years. In each

case, however, your initials should appear immediately under this signature'' (R. 38, 44).

Mr. Robinson's secretaries had no authority from the Commissioner to sign waivers (R. 33, 41; R.² 51). Mr. Robinson testified that he was the only one in his division with the initials "H. B. R." who had authority from the Commissioner to sign waivers (R. 33). He also testified:

"Eight men in my division are now authorized to sign waivers. The number of waivers was so great that it was necessary to have additional men.

* * * * *

"The additional men were authorized to sign waivers in the latter part of 1927 or early part of 1928. They were authorized directly by the Commissioner'' (R.² 47).

Commissioner Blair testified:

"I delegated authority for signing to all of the heads of division, all the collectors of internal revenue, all of the agents in charge and perhaps some others. The delegation of authority to the persons named was essential to the conduct of the Government's business. I delegated such authority to as many people as I thought advisable. I suppose I could have delegated it to everybody, but whenever it was necessary and it was suggested to me that I delegate such and such a person, I did it. Those so delegated were principally men in responsible positions. It was an important matter and I took care to whom I delegated it'' (R. 40).

Mr. Robinson testified that he adopted and approved the signing of the waivers by his secretaries (R. 35),

although he also testified that he did not recall having seen these waivers before the day of the hearing (R. 37).

Miss Durivage and Miss Van Amburg were unable to testify about the circumstances under which they signed the waivers signed by them respectively (R. 41).

The custom in Mr. Robinson's office with reference to signing waivers is described in his testimony as follows:

"Q. Mr. Robinson, will you outline briefly the custom and routine with reference to waivers during the period involved in this case, and these particular waivers I refer to are dated February 18, 1926, and November 18, 1926. A. Waivers coming in which were in great number were all brought to me for the purpose of seeing whether they met the requirements of the Bureau, and for the necessary signatures to record their acceptance.

"Q. State whether or not you issued instructions to those in your office or under your supervision, with reference to whether or not waivers should be brought to your desk. A. I issued instructions that they be brought to my desk.

"The instructions were not in writing. So far as I know they were never disregarded. As a rule, the waivers were signed at my desk. My desk was a large double desk and the person signing waivers sat opposite me at the desk.

"By Mr. Low:

"Q. State what authorization you did give those people who signed waivers for you? A. I merely directed for them to affix the name my initials for me, and that was only in those instances where the number of waivers were so great the necessity for having expeditious action on them was apparent.

* * * * *

“Q. In stating the waivers were brought to your desk, as I understood your testimony, for the purpose of determining whether or not they should be accepted, who exercised that function?

“A. I did” (R.² 44-45).

* * * * *

“My recollection is that I saw all the waivers that came into my division. They came to my office and almost always came to my desk as I recall” (R. 39).

Miss Van Amburg signed waivers at Mr. Robinson's desk (R. 40), but Miss Durivage signed some of them at Mr. Robinson's desk and some at her own desk in an adjoining room (R. 41).

The waivers of February 17, 1926, and November 8, 1926, were executed by the taxpayer in response to written requests from the office of the Commissioner each of which was signed by a Chief of Section for an Assistant to the Commissioner (R. 21, 47-50).

For the convenience of the Court the dates and certain other facts relating to the applicability of the statute of limitations are summarized below:

Return filed—3/15/20

Five year period ended—3/15/25

Deficiency letter mailed—3/14/27

WAIVERS

	<i>Date of Waiver</i>	<i>Date of Expiration</i>	<i>Person Signing Commissioner's Name</i>
(1)	12/24/24	3/15/26	Mr. Lewis
(2)	2/17/26	12/31/26	Miss Durivage
(3)	11/ 8/26	12/31/27	Miss Van Amburg

The statutes involved in this case are included among those set forth in the appendix to the brief in Case No. 5656.

Assignments of Error.

The assignments of error set forth in the petition for review (R. 27-29) which are relied upon by the petitioners may be summarized as follows:

1. The Board erred in entering judgment for the Commissioner.

2. The Board erred in approving and redetermining the deficiency found by the Commissioner.

3. The Board erred in failing to hold that the assessment of all further taxes against Herman C. Fleitmann for the year 1919 was barred at the date of the mailing of the deficiency notice to him on March 14, 1927.

4. The Board erred in failing to hold that the collection of all taxes asserted against Herman C. Fleitmann for the year 1919 was barred at the date of the decision of the case by the United States Board of Tax Appeals.

5. The Board erred in failing to hold that under the evidence the burden of proof was on the respondent in this case to prove that the period of limitations had been extended by valid waivers.

6. The Board erred in failing to hold that there were no sufficient consents in writing which would validate the assessment and/or collection of this tax.

7. The Board erred in failing to hold that all of the waivers relied on by the Government were invalid and void.

8. The Board erred in holding that "when the correspondence between the parties shows that they understood the statute to be extended there is a sufficient consent in writing."

9. The Board erred in holding that the consents in writing were complete when the petitioner signed and filed the waiver forms.

10. The Board erred in holding that the signing of a waiver comprised two elements: first, the discretionary duty of approval which could not be delegated by an agent, and second, the ministerial duty of signing the name of the Commissioner which could be delegated by an agent.

11. The Board erred in holding that the signing of the Commissioner's name to a waiver was a ministerial act.

12. The Board erred in holding that the duty of signing the Commissioner's name to a waiver could be delegated by an agent.

13. The Board erred in holding that under his authority Henry B. Robinson could delegate to subordinates the duty of signing the Commissioner's name to waivers.

14. The Board erred in holding that the attempted delegation to subordinates by Henry B. Robinson of the duty of signing the Commissioner's name to these waivers was a valid delegation.

15. The Board erred in holding that the evidence showed that there was no attempt on the part of Henry

B. Robinson to delegate the duty of passing upon the acceptability of waivers.

16. The Board erred in holding that the evidence showed that said duty "was personally performed by Robinson and Anderson by having the waivers presented to them for decision as to their acceptability."

17. The Board erred in holding that the evidence established that "it was the practice in both Robinson's and Anderson's offices for waivers to be brought to the attention of Robinson and Anderson and when they determined the waivers should be signed, the physical act of signing was delegated to employees."

18. The Board erred in holding with respect to the waivers here in question that the evidence showed "in each instance a waiver was requested by the respondent and it was pursuant to these requests that the waivers were signed and sent in by the petitioners."

19. The findings of the Board that waivers in question were furnished in response to letters from the respondent requesting same are not supported by the evidence.

ARGUMENT.

I.

Assessment of the deficiency is barred because the second and third waivers are invalid for want of proper signature on behalf of the Commissioner.

The return was filed on March 15, 1920. Therefore assessment of the deficiency was barred on March 15, 1925, unless the period of limitation was extended by waiver. Revenue Act of 1920, §250 (d); Revenue Act of 1924, §277 (a).

It is conceded that Mr. Lewis who signed the first waiver, dated December 24, 1924, had authority from the Commissioner to sign the Commissioner's name to the waiver and that this waiver was therefore valid. This waiver extended the period of limitation for assessment to March 15, 1926.

The second waiver, dated February 17, 1926, and the third waiver, dated November 8, 1926, purported to extend the period of limitation to December 31, 1926, and December 31, 1927, respectively. Unless both of these waivers are valid, the period of limitation expired before March 14, 1927, the day when the deficiency letter was mailed, and assessment of the deficiency is therefore barred.

As is shown in the statement of the case, the circumstances under which the Commissioner's name was signed to the second and third waivers are identical with the circumstances under which the Commissioner's name was signed to the second and third waivers involved in Case No. 5656. We submit that they are therefore invalid for want of proper signature on behalf of the Com-

missioner. In support of this point we adopt, as applicable to the facts of this case, the reasoning in Point I of the brief in Case No. 5656.

II.

The consent in writing of the Commissioner required for the validity of the second and third waivers was not contained in the letters requesting these waivers.

As is shown in the statement of the case, the facts relating to this point are substantially the same as the facts relating to the corresponding point, Point II, in the brief in Case No. 5656. In support of this point we adopt, as applicable to the facts of this case, the reasoning in Point II of the brief in Case No. 5656.

III.

The petitioners are not estopped to deny the validity of the waivers.

The facts relating to this point are substantially the same as those relating to the corresponding point, Point IV, in the brief in Case No. 5656. In support of this point we adopt, as applicable to the facts of this case, the reasoning in Point IV of the brief in Case No. 5656.

CONCLUSION.

It is respectfully submitted that the order and determination of the Board of Tax Appeals in this case should be reversed.

Respectfully submitted,

RICHARD E. DWIGHT,
Attorney for Petitioners.

RICHARD E. DWIGHT,
HOWE P. COCHRAN,
FREDERICK S. WINSTON,
WILLIAM N. WOOD,
HAROLD L. SMITH,
CURTISS E. FRANK,
Of Counsel.

Nos. 5655, 5656, 5657 FEB 1 0 1933

Henry W. Hotel
In the Court of Appeals of the District of
Columbia

MARIE J. J. FLEITMANN AND THOMAS CRIMMINS,
EXECUTORS OF THE ESTATE OF HERMAN C. FLEIT-
MANN, DECEASED, PETITIONERS

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVE-
NUE, RESPONDENT

FREDERICK T. FLEITMANN, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVE-
NUE, RESPONDENT

MARIE J. J. FLEITMANN AND THOMAS CRIMMINS,
EXECUTORS OF THE ESTATE OF HERMAN C. FLEIT-
MANN, DECEASED, PETITIONERS

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVE-
NUE, RESPONDENT

ON PETITIONS FOR REVIEW OF DECISIONS OF THE UNITED
STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

G. A. YOUNGQUIST,

Assistant Attorney General.

SEWALL KEY,

MORTON K. ROTHSCHILD,

Special Assistants to the Attorney General.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue,

BRUCE A. LOW,

Special Attorney, Bureau of Internal Revenue,

Of Counsel.

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**In the Court of Appeals of the District of
Columbia**

No. 5655

MARIE J. J. FLEITMANN AND THOMAS CRIMMINS,
Executors of the Estate of Herman C. Fleitmann,
Deceased, petitioners

v.

DAVID BURNET, COMMISSIONER OF INTERNAL
Revenue, respondent

No. 5656

FREDREICK T. FLEITMANN, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL
Revenue, respondent

No. 5657

MARIE J. J. FLEITMANN AND THOMAS CRIMMINS,
Executors of the Estate of Herman C. Fleitmann,
Deceased, petitioners

v.

DAVID BURNET, COMMISSIONER OF INTERNAL
Revenue, respondent

*ON PETITIONS FOR REVIEW OF DECISIONS OF THE UNITED
STATES BOARD OF TAX APPEALS*

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The only previous opinion in case No. 5655 is
that of the United States Board of Tax Appeals

(R. 12), which is reported in 22 B. T. A. 1231. The only previous opinion in case No. 5656 is that of the United States Board of Tax Appeals (R. 21), which is reported in 22 B. T. A. 1223. The only previous opinion in case No. 5657 is that of the United States Board of Tax Appeals (R. 20), which is reported in 22 B. T. A. 1234.

JURISDICTION

The appeal in case No. 5655 involves income taxes for the year 1918 in the amount of \$51,341.78, and is taken from a decision of the United States Board of Tax Appeals entered on June 3, 1931. (R. 16-17.)

The appeal in case No. 5656 involves income taxes for the year 1918 in the amount of \$23,945.57, and is taken from a decision of the United States Board of Tax Appeals entered on June 3, 1931. (R. 31.)

The appeal in case No. 5657 involves income taxes for the year 1919 in the amount of \$14,826.50, and is taken from a decision of the United States Board of Tax Appeals entered on May 29, 1931. (R. 23.)

All of these cases are brought to this Court by petitions for review filed on November 27, 1931 (No. 5655, R. 18; No. 5656, R. 33; No. 5657, R. 25), pursuant to the Revenue Act of 1926, c. 27, Sections 1001, 1002, and 1003, 44 Stat. 9, 109, 110 (U. S. C. Supp. VI, Title 26, Secs. 641-642).

QUESTIONS PRESENTED

1. Whether a waiver is valid under the revenue acts where the Commissioner has consented to the waiver, but his name was not affixed by him personally or by one of the persons expressly authorized by him to sign his name.

2. Whether Section 278 (e) of the Revenue Act of 1924 renders invalid waivers executed after the enactment of the Act with respect to taxes, the assessment and collection of which had become barred prior to the effective date of the Act.

3. Whether the taxpayer is estopped to deny the validity of a waiver where he has secured further consideration of tax liability by filing it.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 28-30.

STATEMENT

No. 5655

The facts as found by the Board of Tax Appeals are substantially as follows (R. 12-14):

Herman C. Fleitmann filed his income-tax return for the calendar year 1918 on March 15, 1919.

On February 9, 1924, Fleitmann executed a waiver extending for a period of one year from that date the period for assessment and collection of 1918 taxes. Commissioner Blair's name was signed to this waiver on February 13, 1924, by Albert Lewis, who was then head of the Personal

Audit Division of the Income Tax Unit and who had been authorized by Blair to sign his name to waivers.

On February 21, 1924, Fleitmann executed a waiver extending the time for assessment and collection for one year after the expiration of the statutory period of limitation or such period as extended by any waivers already on file. Commissioner Blair's name was affixed to this waiver on February 8, 1926. On December 20, 1924, the Commissioner wrote to Fleitmann requesting a further waiver for 1918. In response to this request Fleitmann on December 24, 1924, executed a waiver extending the time for assessment and collection for one year after the expiration of the statutory period or such period as extended by any waivers already on file. Commissioner Blair's name was affixed to this waiver on February 8, 1926, by Albert Lewis.

On February 10, 1925, a jeopardy assessment of income tax for the year 1918 in the amount of \$70,608.70 was made against Fleitmann and he was notified thereof by letter dated February 6, 1925. His counsel protested to the Commissioner, stating among other things that "waivers were duly filed with the Department in December, 1924 * * *." On March 3, 1925, Commissioner Blair wrote to the Collector at New York, referring to the assessment made and stating in part that "Waivers have now been received * * *" and that a certificate of overassessment would be prepared. Subse-

quently a certificate of overassessment was prepared and the entire assessment of \$70,608.70 was abated. In the certificate sent to Fleitmann it was stated that "Since you have filed a waiver for the year 1918 the tax of \$70,608.70 has been over-assessed."

On March 3, 1926, a jeopardy assessment of \$70,608.70, income and profits taxes for 1918, was entered against Fleitmann and he was notified thereof by letter dated April 20, 1926. The petition for redetermination is based upon that notice.

On November 5, 1926, the Commissioner wrote to Fleitmann requesting waivers for the years 1918 to 1921, inclusive. Fleitmann, on November 8, 1926, executed a waiver for the years 1918 to 1921 extending the time to December 31, 1927, except that if a notice of deficiency was sent before that date then the time was to be extended by the time provided by statute. Commissioner Blair's name was affixed to this waiver by the secretary to H. B. Robinson at his direction. Robinson was head of a division in the Income Tax Unit and held a written authorization to sign the Commissioner's name to waivers.

On September 27, 1929, Fleitmann executed a waiver extending until December 31, 1930, the time for collection of the assessment of \$70,608.70 made in 1926, above referred to. This waiver bears the name of Commissioner Lucas in typewriting, followed by that of Collector Anderson written with ink. Anderson's name was signed at his direction by a deputy collector.

No. 5656

The facts as found by the Board of Tax Appeals are substantially as follows (R. 21-23) :

The taxpayer's income-tax return for the calendar year 1918 was filed on March 13, 1919.

On February 7, 1924, the Commissioner notified the taxpayer that he proposed to assess \$42,702.50 additional tax for 1918. In the letter of notification the Commissioner granted the taxpayer thirty days to show cause why the proposed deficiency should not be paid, and asked for a waiver of the statute of limitations. On March 5, 1924, the taxpayer addressed a protest to the Commissioner to which was attached a waiver, dated February 18, 1924, extending the period for assessment and collection for a period of one year from the date of signing by the taxpayer. This waiver does not bear the signature of the Commissioner. On March 8, 1924, the proposed additional tax was assessed and on March 21, 1924, the taxpayer filed a claim for abatement of the entire assessment. In a statement attached to the claim it is stated that "an income and profits tax waiver was signed by the taxpayer and filed with the Commissioner of Internal Revenue."

By letter of February 13, 1926, the Commissioner requested waivers for the years 1918 to 1921. On February 18, 1926, the taxpayer executed a waiver extending the time for assessment of 1918 taxes to December 31, 1926, and also providing for the additional time allowed by statute in case a notice of

deficiency was sent by the Commissioner. The Commissioner's name was signed to the waiver by the secretary to H. B. Robinson, at Robinson's direction. Robinson was head of the Audit Review Division in the Income Tax Unit and held a written authorization from Commissioner Blair dated January 26, 1926, to sign the latter's name to waivers. Previously, under date of December 18, 1925, a communication designated I. T. U. Order No. 83 had been addressed to heads of divisions and others directing that:

Any waiver received from a taxpayer shall be referred to the Head of Division in which the case is under consideration, who will determine whether it is acceptable.

On November 5, 1926, the Commissioner by letter directed to the taxpayer asked for further waivers covering the years 1918 to 1921. The request was acknowledged by taxpayer and with his acknowledgment he enclosed a waiver dated November 18, 1926, extending the time for assessment to December 31, 1927, and providing for the additional time allowed by statute in case a notice of deficiency was sent by the Commissioner. Commissioner Blair's name was signed to this waiver by Robinson's secretary at Robinson's direction.

In a letter dated May 3, 1926, signed by taxpayer and also in a letter dated November 2, 1926, signed by taxpayer's attorney, the assessment made for 1918 was protested and a conference with respect to the assessment was requested.

In letters dated December 16, 1927, November 5, 1928, and September 25, 1929, the Collector for the Third District of New York requested the taxpayer to execute waivers covering the assessment made for 1918. In response to the Collector's requests, waivers were executed, dated December 15, 1927, October 17, 1928, and September 27, 1929, extending the time, respectively, to December 31, 1928, December 31, 1929, and December 31, 1930, for collection of the assessment made for 1918. Taxpayer's name was affixed to the waiver of October 15, 1928, by his attorney in fact, who held a power of attorney. The name of the Commissioner was typewritten in these three waivers, and the Collector's name was signed by a deputy collector at the direction of the Collector.

On August 20, 1926, Acting Commissioner C. R. Nash addressed a communication, designated A & C Mimeograph, Coll. No. 3459, to collectors, relating to collection waivers and stating "authority is hereby delegated to Collectors of Internal Revenue to sign such waivers in the name of the Commissioner * * *." The waivers referred to in that mimeograph are of the kind described in the preceding paragraph.

In a letter to the Collector for the Third District of New York, dated December 21, 1929, the Commissioner stated in part:

As Commissioner of Internal Revenue, I hereby affirm, ratify and adopt, as my own act and deed, all your prior actions in signing the name of the

Commissioner of Internal Revenue to assessment and/or collection waivers under authority of A & C Mimeograph, Coll. No. 3606, R. A. No. 445, dated February 28, 1928, as amended by IT-Mimeograph, Coll. No. 3741, R. A. No. 510, dated June 1, 1929.

The Commissioner allowed taxpayer's abatement claim for \$482.78 and rejected it for \$42,219.72 and notified taxpayer of his action by letter dated March 14, 1927. From this letter taxpayer appealed to the Board.

No. 5657

The facts as found by the Board of Tax Appeals are substantially as follows (R. 21-22):

The returns of taxpayer's decedent, Herman C. Fleitmann, for the calendar years 1919, 1920, and 1921 were filed, respectively, on March 15, 1920, March 15, 1921, and March 15, 1922.

On December 24, 1924, Fleitmann executed a waiver extending the time for assessment and collection of 1919 taxes "for a period of one year after the expiration of the statutory period." Commissioner Blair's name was placed on this waiver on February 8, 1926, by Albert Lewis, who was then head of the personal audit division of the Income Tax Unit, and who had been authorized by Blair to sign waivers.

On January 22, 1926, the Commissioner wrote to Fleitmann in regard to 1918 and 1919 returns and asked that he execute the waiver forms that were

enclosed with the letter. On February 12, 1926, the Commissioner sent a telegram to Fleitmann's attorney asking that the waivers requested in the letter of January 22, 1926, be submitted. On February 13, 1926, the Commissioner wrote to Fleitmann asking for waivers for the years 1919 to 1921 and enclosed waiver forms with the letter. Fleitmann executed three separate waivers, all dated February 17, 1926, one for each of the years 1919, 1920, and 1921, each extending the statutory period for assessment to December 31, 1926, and providing for the additional time allowed by statute in the event of the sending of a deficiency notice before that date. Commissioner Blair's name was placed on each of these waivers by the secretary to H. B. Robinson, at Robinson's direction. Robinson was head of the audit review division in the Income Tax Unit, and held a written authorization to sign Blair's name to waivers.

On November 5, 1926, the Commissioner wrote Fleitmann requesting that he execute and return the waiver forms enclosed with the letter extending the limitation period for the years 1918 to 1921, inclusive. On November 8, 1926, Fleitmann executed a waiver extending the time for assessment for the years 1918 to 1921, inclusive, to December 31, 1927, and also providing for the additional time allowed by statute in the event of the sending of a deficiency notice before that date. Commissioner Blair's name was affixed to this waiver by the secretary to H. B. Robinson at Robinson's direction.

The deficiency notice was mailed to Fleitmann on March 14, 1927.

SUMMARY OF ARGUMENT

The taxpayer contends that the statute of limitations has run on the deficiencies in question because the waivers introduced in evidence by the Commissioner are not valid. The ground for the invalidity of the waivers is that the Commissioner's signature was not affixed to the waivers by him personally or by one of the persons expressly authorized by him to sign waivers. The statutory requirement in regard to waivers is that both the Commissioner and the taxpayer must consent in writing. The taxpayer does not contend that the Commissioner did not consent to the waiver, nor that the waiver was not evidenced by a writing, but rests his argument on the fact that the Commissioner's signature was not affixed by a person to whom the Commissioner expressly delegated authority to sign waivers, but by a subordinate of that person. A waiver signed in that manner is within the terms of the statute because it is not disputed that the Commissioner consented to the waiver. The fact that the Commissioner requested a waiver and accepted and relied upon it indicates his consent within the terms of the statute. There is no requirement in the statute that the consent must be evidenced by a single instrument. The fact that the Commissioner's signature was affixed by a subordinate is immaterial.

While there is no evidence to show that the particular waivers were signed at the direction of a duly authorized official, there is evidence to show that they were signed pursuant to the customary routine of the office, and there is no evidence to show that they were not duly authorized by the Commissioner. The waivers were valid, even if they had not been signed in behalf of the Commissioner. Moreover, if there is any question about the authority of the person who signed the waivers, the evidence shows that the responsible officers afterwards ratified and approved their acts. There are various arguments against particular waivers which are untenable.

The taxpayer contends that Section 278 (e) of the Revenue Acts of 1924 and 1926 renders invalid some of the waivers because they were executed after the enactment of the respective acts with respect to taxes, the assessment and collection of which had become barred prior to the effective dates of the respective acts. This issue is controlled by the *McDonnell* case, now pending in the Supreme Court.

If the waivers were invalid, the taxpayer would be estopped from questioning their validity because the taxpayer has benefited by filing them. The Commissioner gave further consideration to the tax liability of the taxpayer, as a result of which the tax liability was substantially reduced.

ARGUMENT

I

A waiver is valid under the revenue acts where the Commissioner has consented to the waiver, although his name was not affixed by him personally or by one of the persons expressly authorized by him

In *L. J. Christopher Co. v. Commissioner*, 55 F. (2d) 530, this Court said (p. 531) :

Nor is the contention that the waiver was not signed personally by the Commissioner controlling. The signing of a waiver is a mere ministerial act and may be done by the commissioner personally, or his name may be subscribed by another under his direction, as was evidently done in this case. It was held in *United Thacker Coal Co. v. Commissioner* (C. C. A.), 46 F. (2d) 231, 233: "The Commissioner is presumed to discharge his official duties in a proper and legal manner; and, in this case, if it was essential that the Commissioner should have directed the placing of the signature upon each waiver, this is presumed to have been done in the absence of evidence to the contrary, for public officials are presumed to act correctly and in accordance with the law." To the same effect are: *Trustees for The Ohio & Big Sandy Coal Co. v. Commissioner* (C. C. A.) 43 F. (2d) 782; *Pantages Theater Co. v. Lucas* (C. C. A.) 42 F. (2d) 810; *Greylock Mills v. Commissioner* (C. C. A.) 31 F. (2d) 655; *Burnet v. Railway Equipment Co.*, 282 U. S. 295.

In *Onondaga Co. v. Commissioner*, 50 F. (2d) 397 (C. C. A. 2d), certiorari denied, 284 U. S. 671, the court said (p. 399):

Waivers within the time and at three different times were signed extending the time to make assessment until December 31, 1927. These waivers were signed in the name of the Commissioner, but not by him personally. The Commissioner's deficiency letter was mailed December 15, 1926. The contention is that these waivers are invalid because they were not signed personally or by a deputy commissioner. Is the Commissioner's personal signature necessary to the validity of the waiver? Section 278 (c) provides: "Where both the commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

This provision was inserted for administrative purposes. *Florsheim Bros. v. U. S.*, 280 U. S. 453; *Stange v. United States*, 282 U. S. 270; *Burnet v. Chicago Ry. Co.*, 282 U. S. 295. The courts have taken the view that an initial signature, not in the Commissioner's handwriting, will be presumed to be authorized within section 250 (d), where it appears in a waiver which has been the subject of official action. The courts have not said that a signature is unnecessary or that it is merely directory, not mandatory. The administrative character of the provision was

considered in the *Florsheim Case* to show that a waiver was not a contract binding the government to the time named in it, and in the *Stange Case* the administrative character of the provision was mentioned in deciding what power the Commissioner possessed before its enactment. It will be presumed that the signatures to waivers were properly affixed within the meaning of section 250 (d), since it was apparently affixed by some one connected with the Department. The Commissioner acted upon them in sending out the deficiency letter later. The Commissioner may delegate this authority, and the one signing the waiver under such delegations is authorized to do so. And such delegation is sufficient authority. *United Thacker Coal Co. v. Com'r*, 46 F. (2d) 231 (C. C. A. 1); *Trustees for Ohio Coal Co. v. Com'r*, 43 F. (2d) 782 (C. C. A. 4); *Pantages Theater Co. v. Lucas, Com'r*, 42 F. (2d) 81 (C. C. A. 9); *Liberty Baking Co. v. Heiner*, 37 F. (2d) 703 (C. C. A. 3).

Taxpayer argues that the waivers were invalid for want of proper signature on behalf of the Commissioner, first, because Mr. Robinson and Collector Anderson did not have the power under the statute to redelegate to subordinates the duty of signing the Commissioner's name to waivers, and secondly, assuming that the statute permitted it, the evidence does not show that they did redelegate the authority to sign the particular waivers in this case. Section 250 (d) of the Revenue Act of 1921, under which

the first waiver was signed, provides only that "both the Commissioner and the taxpayer consent in writing" to a later assessment and collection of the tax. It does not specify that there must be a waiver to which both the taxpayer and the Commissioner must affix their signatures. The later acts are substantially the same in this respect, and merely require that both the Commissioner and the taxpayer consent in writing. These statutes do not prohibit the Commissioner from delegating to another official his authority to consent in writing.

The *Christopher case*, cited above, holds that the waiver may be signed by the Commissioner personally, or his name may be subscribed by another under his direction. The *Onondaga case* holds that the Commissioner may delegate authority to sign a waiver, and that such delegation is sufficient authority. In reaching this conclusion the Second Circuit relied on the decisions of the First, Third, Fourth, and Ninth Circuits. Obviously, the basis of these decisions is that the Commissioner can not perform all the functions of that office in person because of the tremendous volume of work which he is required to do under the revenue act. Apparently the taxpayer does not question the power of the Commissioner under the statute to delegate to other officials the authority to sign waivers, but does question the power of the person to whom the authority is delegated to redelegate the power to another. The cases which the taxpayer cites in support of his position are not cases which involve

the redelegation of authority. They are cases in which the express terms of the statute were not complied with, or where the signature of the official designated in the statute was not affixed. There is nothing in the statute nor in any of the cases cited by the taxpayer to support the argument that an official may not redelegate authority to do a mere clerical or physical act such as signing a document. As far as we can ascertain there are no authorities dealing with the power of a public officer to redelegate authority to affix a signature. However the law of agency appears to be settled that while an agent may not redelegate authority to do an act which requires the exercise of discretion or judgment, he may in the absence of an express prohibition delegate authority which involves only a clerical or mechanical act such as affixing a signature. *Empire Gas & Fuel Co. v. Allen*, 294 Fed. 617 (C. C. A. 5th); *Malaguti v. Rosen*, 262 Mass. 555, 564, 160 N. E. 532, 536 (Mass.); *Gibson v. National Park Bank of New York*, 98 N. Y. 87, 96; *Wright v. Providence, Washington Ins. Co.*, 130 Kan. 438, 286 P. 237; *Worsley v. Ayres*, 144 Iowa 676.

Congress did not attempt to prescribe the form of a waiver, as it did in the cases cited by the taxpayer. It merely defined the period of limitations, and provided that it might be extended if both the Commissioner and the taxpayer consent in writing. The statute reads "consent in writing." It is obvious from the language that the thing of prime importance is the *consent*, not the mere writing.

The substantial requirement, on the part of the Government, was the consent of the Commissioner. In the instant case, it appears that the Commissioner delegated to Mr. Robinson and to Collector Anderson the power to consent to waivers. This involved the exercise of discretion. There was no redelegation of that discretionary power on the part of those men. They themselves exercised that power in this case by examining the waivers, and determining in their discretion whether or not they were acceptable to the department. It was only the mere mechanical affixing of the signature after the exercise of their discretion which was turned over to their subordinates. The mere physical signing of the waiver does not amount to a redelegation of the discretionary authority to consent to a waiver. The taxpayer does not contend that the Commissioner did not consent to the waiver, but merely that the person who signed the Commissioner's name was not authorized to sign under the terms of the statute. We submit that the statute does not require the Commissioner's signature on the same instrument signed by the taxpayer or his agent, but primarily a consent on the part of the Commissioner, and secondarily that the consent be evidenced in writing. The Commissioner's written request for the waivers, and the acceptance and filing of the waivers after the taxpayer signed them complies with the terms of the statute.

As to the taxpayer's argument that the evidence does not show that Mr. Robinson and Collector

Anderson authorized the signing of the particular waivers involved in this case, it is necessary to examine the evidence. While the employees did not have written authority to sign his name, the record clearly shows that they had oral authority to do so. Mr. Robinson testified that the custom and routine with reference to waivers during the period involved was that they were brought to him for the purpose of seeing whether they met the requirements of the Bureau, and for the necessary signatures to record their acceptance; that he issued instructions to have them brought to his desk; that the instructions were not in writing and, as far as he knew, were never disregarded; as a rule the waivers were signed at his desk, and the person signing waivers sat opposite him at his desk; that he directed the people who signed the waivers for him to affix his initials for him; and that the reason for the custom was the great number of waivers. (No. 5656, R. 44.) He said that there were thousands and thousands of waivers which came to his desk, and while he could not recall having seen these particular waivers, in the ordinary routine, he would have seen them. No one else was authorized to determine whether or not a waiver should be accepted. (No. 5656, R. 45.)

Mr. Robinson testified further that there was a door which was always open between his office and the secretary's office, and his secretary was in sight of him all the time; his secretaries did not sign his name to waivers, but the name of D. H. Blair,

the Commissioner, and the initials H. B. R. under it. (No. 5656, R. 47.) Mr. Robinson's secretary corroborated his testimony. (No. 5656, R. 51; No. 5657, R. 40, 41.)

In the Collector's office, there was a similar custom and routine. Mr. Shea testified that waivers are usually brought to his desk and carried in to the Collector for his examination; the Collector goes over them to ascertain whether or not they are properly executed and directs him to sign them; the waivers in question were signed by William J. O'Brien during Shea's absence, pursuant to the usual procedure. (No. 5656, R. 49.)

Mr. Robinson further testified that on another occasion he instructed Miss Mead, his secretary, to sign the name of the Commissioner and his initials to one of the waivers, and that he adopted and approved the signatures of the waivers by his secretaries. (No. 5657, R. 34, 35.) Several hundred waivers came to his desk every day. (No. 5657, R. 39.) Miss Durivage signed another of the waivers in Mr. Robinson's office; she signed only waivers that he had approved. (No. 5657, R. 41, 42.) It was stipulated that the evidence in all three cases in regard to signing the waivers in behalf of the Commissioner might be considered by the Board in each case. (No. 5655, R. 26; No. 5656, R. 42; No. 5657, R. 43.)

Assuming that the waivers had no signature in behalf of the Commissioner, they were nevertheless valid. *Commissioner v. Hind*, 52 F. (2d) 1075

(C. C. A. 9th). In that case the court said (p. 1078):

The provisions concerning waivers in the various tax acts are not inserted for the benefit or protection of the taxpayer. *Florsheim Bros. Drygoods Co. v. United States, supra*. The provision is one for convenience only, and the Supreme Court has said: "The protection of the convenience only of a taxpayer is not of such a vital nature as to authorize a court to treat a statute primarily directed to public officers for their guidance (i. e. for 'purely administrative purposes'), and the substantial protection of the government, as mandatory, and to consider official acts not in strict conformity with the statute as void. The protection must be substantial, and must be intended as a guard of rights or property. * * *"
Erhardt v. Schroeder, 155 U. S. 124, 129, 130.

There was no such protection here, no substantial rights of the taxpayer that would have been better safeguarded by the signature of the Commissioner; and it seems that, since the provision relative to the Commissioner's signature, as held by the Supreme Court, was for "purely administrative purposes," his failure to sign the waiver of February 25, 1926, did not render such waiver invalid.

Section 278 (c) of the Revenue Act of 1924 provides that where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed for its

assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon. There is no requirement in the statute that a consent be evidenced by one piece of paper. The Board found that in each instance a waiver was requested by the Commissioner, and that it was pursuant to these requests that the waivers were signed and sent in by the taxpayer. (No. 5656, R. 25.) Since the correspondence between the parties shows that they understood the statute to be extended, there is a sufficient consent in writing within the terms of the statute. *Sabine v. United States*, 44 F. (2d) 70, 76 (C. Cls.); *Moses v. United States*, 43 F. (2d) 653, 657 (E. D. N. Y.).

Moreover, if there is any question about the authority of the employees who signed the waivers in behalf of the Commissioner to do so, the Commissioner may be said to have ratified and approved their acts when he sent out the deficiency notices. The taxpayer has not questioned the regularity or authenticity of the signatures to those letters. As to the waivers signed by Mr. Robinson, he testified that he adopted and approved the acts of his secretaries in signing the waivers. (No. 5657, R. 35.) As to the waivers signed by Collector Anderson, Commissioner Lucas ratified and adopted waivers signed by the former in his behalf. (No. 5656, R. 84-85.)

In case No. 5655, the taxpayer questions the validity of the waiver dated February 21, 1924, on the ground that it was intended to run concurrently

with that of February 9, 1924. The waiver specifically provided that it was in effect from the date it was signed by the taxpayer and would remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau. (No. 5655, R. "49," facing R. 38.) The Commissioner's name was signed to the waiver dated February 9, 1924, on February 13, 1924, and it was on file in the Bureau when the second was executed by the taxpayer. (No. 5655, R. 12.) Accordingly, upon its face, the effect of the second waiver operated to extend the period for assessment and collection to February 9, 1926. The taxpayer introduced no evidence to show that the parties in executing the waiver intended anything other than the expressed intent of the plain words of the waiver.

In case No. 5656, the taxpayer questions the validity of the second and third waivers on the ground that they were executed by reason of mistake and fraud. (Br. No. 5656, 35, 44.) The letters requesting the waivers contained a statement to the effect that the period of limitations would presently expire, when the period had in fact already expired. But the fact that the statute had already run is not important. See *Stange v. United States*, 282 U. S. 270; *Pottash Bros. v. Burnet*, 50 F. (2d) 317 (App. D. C.); *Consumers' Ice Co. v. Burnet*, 50 F.

(2d) 341 (App. D. C.). Moreover the taxpayer introduced no evidence to show that he was misled by the statement in the Commissioner's letter. In fact, as a result of the further consideration of his tax liability, he was greatly benefited by the extension granted, because his tax liability was reduced from \$42,219.72 (No. 5656, R. 11) to \$23,945.57 (No. 5656, R. 30).

In case No. 5656, the taxpayer argues that the third and fourth waivers were invalid because the liability for the deficiency had been extinguished by Section 1106 (a) of the Revenue Act of 1926. This section was repealed by Section 612 of the Revenue Act of 1928 as of the date of its passage. Congress had constitutional authority to revive the liability of taxpayers under such circumstances. *Mascot Oil Co. v. United States*, 282 U. S. 434.

II

Section 278 (e) of the Revenue Act of 1924 does not render invalid a waiver executed after the enactment of the Act with respect to taxes, the assessment and collection of which had become barred prior to the effective date of the Act

In case No. 5656, the taxpayer contends that since the waiver dated February 18, 1924, was invalid because it did not bear the signature of the Commissioner, the collection of the deficiency was barred on March 13, 1924. (Br., No. 5656, 35.) It appears that a second waiver was filed on February 18, 1926, which was duly executed in behalf of the

Commissioner and which must have been authorized by Section 278 (c) of the Act of 1924. But Section 278 (e) of the Act of 1924 provides that this section shall not authorize the assessment or collection of a tax if at the time of the enactment of this Act such assessment was barred by the statute of limitations then in existence. The taxpayer contends that Section 278 (e) qualifies Section 278 (c), and renders the waiver dated February 18, 1926, invalid because the assessment and collection was barred on March 13, 1924, prior to the enactment of the Act of 1924. That question is now before the Supreme Court in *McDonnell v. United States*, No. 90, October Term, 1932, and the decision in that case, which is expected momentarily, will control this case.

In case No. 5656, the taxpayer argues that the third, fourth, fifth, and sixth waivers were invalid for the same reason, except that they are controlled by the Act of 1926. Therefore, the *McDonnell* case should control those waivers as well as the second. But the taxpayer failed to recognize that Section 278 (e) of the Act of 1926 has this saving clause, "unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto." The second waiver was dated February 18, 1926, prior to the enactment of the Act of 1926, so that under the Act of 1926 the tax could be collected at any time prior to the expiration of the period agreed upon. Even though the first waiver was invalid, the second waiver would not be invalid

merely because it was executed after the period of limitation had expired. *Stange v. United States*, 282 U. S. 270; *Burnet v. Chicago Railway Equipment Co.*, 282 U. S. 295.

If, however, the waiver dated February 18, 1924, is valid, even though it does not bear the Commissioner's signature, as held in *Commissioner v. Hind*, *supra*, then Section 278 (e) of both the Revenue Acts of 1924 and 1926 is not applicable, and the *McDonnell* case will not control.

III

The taxpayer is estopped to deny the validity of a waiver where he has benefited by filing it

In any event, the taxpayer is estopped to deny the validity of the waivers because he has benefited by filing them. When the Commissioner proposed an assessment of some \$42,000 in 1924, the taxpayer executed and forwarded a waiver with the request that further consideration be given to the facts. He also requested a conference with the unit for the purpose of discussing the matter in detail. (No. 5656, R. 65.) Mr. Slaughter testified that he expected to receive further consideration when he filed the waivers and that he got further consideration. (No. 5655, R. 31.) As a result of that consideration the tax liability was reduced from \$85,014.40 to \$51,341.78. (No. 5655, R. 16.)

The taxpayer's position is similar to that of the taxpayer in *Magee v. United States*, 282 U. S. 432. In that case the taxpayer contended that a claim in

abatement which he filed in 1921 was illegal under Section 250 (d) of the Revenue Act of 1921, and that therefore his case was not covered by Section 611 of the Revenue Act of 1928. The court rejected the contention, and said (p. 434) :

The taxpayer benefited by the claim and is not in a position to contest its legality.

See also *Florsheim Bros. Co. v. United States*, 280 U. S. 453, 464; *United States v. John Barth Co.*, 279 U. S. 370, 376; *Lucas v. Hunt*, 45 F. (2d) 781 (C. C. A. 5th); *Trustees for Ohio & Big Sandy Coal Co. v. Commissioner*, 43 F. (2d) 782, 784-785 (C. C. A. 4th); *Liberty Baking Co. v. Heiner*, 37 F. (2d) 703 (C. C. A. 3d).

CONCLUSION

The decisions of the Board of Tax Appeals are correct and should therefore be affirmed.

Respectfully submitted.

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APPENDIX

Sections 277 and 278 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300 (U. S. C., Title 26, Secs. 1057, 1058-1062) provide:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

(1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(3) In the case of income received during the lifetime of a decedent, the tax shall be assessed, and any proceeding in court for the collection of such tax shall be begun, within one year after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary represent-

ing the estate of such decedent, but not after the expiration of the period prescribed for the assessment of the tax in paragraph (1) or (3) of this subdivision.

(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in

court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) effect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

Section 278 (c) and (e) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Secs. 1060, 1062) provides:

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act.

